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# FIXING A HOLE: HOW THE CRIMINAL LAW CAN BOLSTER REPARATIONS THEORY

ERIC L. MULLER\*

**Abstract:** High-profile popular-press authors recently have challenged the mainstream consensus that certain historical events should be condemned as injustices. These authors argue that such condemnation unfairly imposes modern standards on historical actors. Until now, the redress movement has largely ignored these partisan revisionists who have sought to justify the harmful decisions made by past generations. Such revisionism, however, threatens the very foundation of reparations theory by persuading the public that redress is unnecessary because historical figures actually committed no injustice by merely acting appropriately, given the historical context in which they lived. This Article seeks to initiate a dialogue regarding how to approach the task of defining a historical injustice. The Article draws an analogy to the criminal law's "cultural defense," proposing a framework by which legal scholars may fairly judge the wrongdoing of historical actors. Although the analogy between foreign cultures and historical eras is imperfect, it presents a useful starting point to stimulate critical discussion about how best to address the growing structural weakness in the foundation of reparations theory.

*The past, they say, is another country.*

—Rhys Isaac<sup>1</sup>

## INTRODUCTION

Over approximately the past twenty years, scholars have built an elaborate theoretical structure of reparations for historical injustices. These scholars have paid careful attention to issues of causation, methods of compensation and restitution, the problem of privity between wrongdoers and victims, the necessity of apology, and the viability

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\* © 2006, Eric L. Muller, George R. Ward Professor, University of North Carolina School of Law. I had helpful conversations about many of the ideas in this Article with Bill Marshall, Kay Levine, Deborah Weissman, Joe Kennedy, Melissa Jacoby, Maxine Eichner, Scott Baker, Andrew Chin, Richard Myers, Leslie Branden-Muller, Abby Muller, and Nina Muller.

<sup>1</sup> RHYSS ISAAC, LONDON CARTER'S UNEASY KINGDOM: REVOLUTION AND REBELLION ON A VIRGINIA PLANTATION 105 (2004).

ity of reconciliation as an alternative or supplement to reparation.<sup>2</sup> Naturally, disagreements about the design of the structure remain, and considerable construction work remains to be done. But there is no doubt that a sizable scholarly structure now stands in what was once an empty field.

That structure, however, has an unseen hole in its foundation which threatens the integrity of the entire structure that sits atop it. The hole has been opened by partisan historical revisionists who deliberately manipulate and misrepresent historical evidence for political purposes.<sup>3</sup> The most notorious example of this sort of revisionism is the continuing efforts of some to undermine settled accounts of the existence, nature, and scope of Nazi atrocities in Europe during World War II.<sup>4</sup>

Recently, high-profile partisan revisionism has crossed the Atlantic and begun to poke at the foundations of American historiography. In the last several years, no fewer than *three* works of partisan revisionism have climbed high on the New York Times best-seller list: Ann Coulter's 2003 book, *Treason*,<sup>5</sup> which attempts, among other things, to justify the excesses of McCarthyism; Michelle Malkin's 2004 book, *In Defense of Internment*,<sup>6</sup> which seeks to justify the racial incarceration of some 50,000 Japanese aliens and some 70,000 U.S. citizens of Japanese ancestry during World War II; and Thomas E. Woods's 2005 book, *The Politically Incorrect Guide to American History*,<sup>7</sup> which tries, among many other things, to establish the virtue of Southern secessionism and to defend the power of states to permit slavery.<sup>8</sup> In each instance, the author has a clear partisan purpose for his or her retelling of the episode in question: Coulter seeks to establish the Demo-

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<sup>2</sup> One excellent summary is Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497 (2003).

<sup>3</sup> Partisan historical revisionism must be distinguished from the healthy process of revising historical understanding to take into account newly discovered evidence. Responsible and dispassionate consideration of new evidence is the essence of good historical practice; it ensures that the study of history remains fresh and vibrant.

<sup>4</sup> David Irving is probably the best-known representative of this movement. See DEBORAH LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* 8 (1994).

<sup>5</sup> See generally ANN COULTER, *TREASON: LIBERAL TREACHERY FROM THE COLD WAR TO THE WAR ON TERROR* (2003).

<sup>6</sup> See generally MICHELLE MALKIN, *IN DEFENSE OF INTERNMENT: THE CASE FOR "RACIAL PROFILING" IN WORLD WAR II AND THE WAR ON TERROR* (2004).

<sup>7</sup> See generally THOMAS E. WOODS, JR., *THE POLITICALLY INCORRECT GUIDE TO AMERICAN HISTORY* (2004).

<sup>8</sup> See *id.* at 43-75.

cratic Party as a party of traitors to the United States, Malkin seeks to advance an agenda of aggressive racial and religious profiling against Arabs and Muslims, and Woods seeks to further the efforts of radical libertarians to undermine all federal power.

Scholars might prefer to ignore these popular-press books and their authors, but they do so at their peril. Not only do these revisionist works draw more public attention and a larger readership than any work of mainstream scholarship could hope to attain, but, in the name of current political goals, these authors also bash away at the foundations for recognizing three of the most important episodes of historic American injustice: slavery, the Japanese American internment, and McCarthyism.

For scholars who focus on reparations theory, these works could not be more threatening; they tear open holes in the foundation of reparations theory by seeking to persuade millions of Americans that what we commonly take to be episodes of historical injustice were not, in fact, unjust. All of the carefully wrought theories of restitution, recovery, causation, reconciliation, and apology that scholars have developed in recent decades will surely be for naught if Americans come to believe that American history includes no episodes of true injustice.

This Article calls for repair of this critical hole in the foundation of reparations theory. It seeks to initiate discussion about how best to repair the hole by proposing an approach to defining historical injustice derived from principles of American criminal law. The method proceeds by analogy: it compares the problem of judging the wrongdoing of historical actors with the familiar criminal law problem known as the "cultural defense." The cultural defense is a legal strategy in which a defendant presents evidence of his or her cultural background to attempt to avoid criminal liability.<sup>9</sup> In a typical cultural defense case, a recent immigrant from a foreign culture argues that it is unfair to judge her here for an act that was permissible, or at least tolerated, under her foreign culture's legal, ethical, or social norms.<sup>10</sup> The cultural defense might first appear to have little to do with the problem of defining historical injustice. But the problem of defining historical injustice typically arises as a debate about whether it is fair to judge the actions of a historical figure by current legal and ethical

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<sup>9</sup> See Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101, 102-03 (1997); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense"*, 17 HARV. WOMEN'S L.J. 57, 57 (1994).

<sup>10</sup> For a full definition of the term "cultural defense," see Volpp, *supra* note 9, at 57.

standards, rather than the standards of her earlier era.<sup>11</sup> Seen this way, the analogy emerges: just as we might consider excusing a person because of *where* she is from, we might also consider excusing a person because of *when* she is from. It is an analogy between the culture of a place and the culture of an era.

The fact is, however, that American criminal law very rarely excuses a person because of culture.<sup>12</sup> Indeed, no American jurisdiction has recognized a complete, free-standing cultural defense to criminal liability.<sup>13</sup> By and large, the cultural defense has failed as an innovation in American law, and immigrants are usually judged by the same standards as non-immigrants.<sup>14</sup> Only in the rare circumstance where the overwhelming influence of an immigrant's culture completely vitiates his mens rea does the law relent and excuse the immigrant's act.<sup>15</sup>

The criminal law's near-total repudiation of the cultural defense suggests that we ought to be similarly wary of its temporal cousin. That is, just as we have good reasons to decline to excuse a person simply because of his cultural background, we have similarly good reasons to decline to excuse a person simply because of his historical background. We should not shy away from labeling slave ownership, racial internment, or McCarthyism as historical injustices simply because their wrongfulness is clearer to us today than it may have been to the perpetrators at the time. Instead, as with the cultural defense, we should excuse a historical actor and find no historical injustice

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<sup>11</sup> See generally, e.g., MALKIN, *supra* note 6.

<sup>12</sup> See Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime: Kargar and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829, 831-32 (1999) (noting the infrequency of application of the cultural defense at the appellate level).

<sup>13</sup> See Dierdre Evans-Pritchard & Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong "Marriage by Capture" Case in Fresno, California*, 4 S. CAL. INTERDISC. L.J. 1, 19 (1994); see also Volpp, *supra* note 9, at 57.

<sup>14</sup> See ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* 6 (2004) ("[J]udges often exclude evidence about cultural background on the ground that it is 'irrelevant.'").

<sup>15</sup> See Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36, 70-86 (1995). To be sure, rare cases arise in which an overpowering cultural influence prevents a defendant from forming the mens rea that the law requires. Such a case was arguably *People v. Chen*. See Kim, *supra* note 9, at 119-21 (describing *People v. Chen*, No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989)). Another such case was *State v. Kargar*. See Wanderer & Connors, *supra* note 12, at 836-42 (analyzing at length *State v. Kargar*, 679 A.2d 81 (Me. 1996)). More commonly, judges consider mitigating evidence of a defendant's cultural background in deciding whether the defendant deserves a modest break at sentencing. For more on this approach, see Damian W. Sikora, Note, *Differing Cultures, Differing Culpabilities?: A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing*, 62 OHIO ST. L.J. 1695 (2001).

only where the attitudes and urgencies of an actor's historical era viti-ate his mens rea.

Although it is admittedly odd to think of historical actors having or not having a mens rea, this Article identifies several factors relating to the *choseness* of the actor's conduct that can help us distinguish past acts that should be wholly or partly excused from those that should not. The inquiry will focus on the political and social climate, moral norms, and behavioral expectations of the actor's day. Were they truly monolithic? Did the actor's society know a rival tradition? Did the actor have access to that rival tradition? In other words, do we look back on the actor's behavior and see it as a *choice*, an act of independent moral agency, rather than an inevitability? Only to the extent that we see behavior as inevitable should we think about labeling it as something other than a historical injustice.

This Article does not maintain that the analogy between foreign cultures and earlier eras is perfect, or that it single-handedly solves the problem of defining historical injustice. Rather, it is merely an initial effort to fix a hole in the foundation of reparations theory that scholars have ignored until now, which is growing larger and more dangerous with the ascension of each new partisan revisionist tome up the New York Times best-seller list. Other methods for fixing the hole should—and hopefully will—come from other areas of the law and from disciplines outside of law entirely, most notably history and philosophy. This Article will have more than served its task if it draws attention to this growing structural weakness in the foundation of reparations theory and stimulates critical discussion about how best to fix it—whether by analogy to the criminal law's cultural defense, or by some other method.

Part I of this Article demonstrates that leading works on reparations theory have not adequately defined what constitutes a historical injustice.<sup>16</sup> Part II uses the example of the Japanese American internment during World War II to illustrate the problems that can result from the failure to define a historical injustice.<sup>17</sup> Part III introduces an analogy between the criminal law's "cultural defense" and a "temporal defense," suggesting a framework by which reparations scholars may begin to address the challenge of assigning culpability to historical actors.<sup>18</sup> This Part then considers several possible flaws in

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<sup>16</sup> See *infra* notes 23–52 and accompanying text.

<sup>17</sup> See *infra* notes 53–86 and accompanying text.

<sup>18</sup> See *infra* notes 87–91 and accompanying text.

the analogy and examines how such challenges may be addressed.<sup>19</sup> Part IV examines the scholarly debate regarding the dangers and advantages of allowing cultural evidence to excuse the actions of criminal defendants, and discusses how these debates can provide guidance for assigning culpability to historical actors.<sup>20</sup> Part V discusses how cultural evidence can negate the mens rea element of a criminal act, and draws upon historical examples to recommend a similar "lack of mens rea" defense for historical actors.<sup>21</sup> Finally, Part VI applies this framework to examine the culpability of historical actors responsible for the Japanese American internment to determine whether this episode should be regarded as a historical injustice meriting redress.<sup>22</sup>

### I. THE DANGEROUS HOLE IN THE FOUNDATION OF REPARATIONS THEORY

It is difficult to point out something that is absent. But something crucial—indeed, foundational—is missing from the sizable literature on reparations. What is missing is a theory of how to define a potentially reparable historic injustice.

Consider several leading works on reparations. In *Politics and the Past: On Repairing Historical Injustices*, edited by sociologist John Torpey, an array of scholars in law, sociology, history, and anthropology discuss and debate a variety of problems in the theory and practice of reparations, restitution, and apology.<sup>23</sup> Yet all have a common point of departure: an assumption that what needs discussing is how best to respond to "claims for mending past wrongs that are . . . extremely varied, running the gamut from specific human rights abuses against individuals such as unjust imprisonment and torture to such diverse social systems as plantation slavery, apartheid, and colonialism."<sup>24</sup> That is, the existence of these "past wrongs" is the shared premise of the entire project. Each scholar simply assumes that instances of torture, unjust imprisonment, slavery, apartheid, and colonialism are "wrongs," and the more interesting question is how scholars with a focus on transitional justice, reparations, apology, and reconciliation

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<sup>19</sup> See *infra* notes 92–96 and accompanying text.

<sup>20</sup> See *infra* notes 97–129 and accompanying text.

<sup>21</sup> See *infra* notes 130–97 and accompanying text.

<sup>22</sup> See *infra* notes 198–234 and accompanying text.

<sup>23</sup> See generally *POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES* (John Torpey ed., 2003) [hereinafter *POLITICS AND THE PAST*].

<sup>24</sup> *Id.* at 5–6.

respond to these "wrongs."<sup>25</sup> Nowhere in the volume does any scholar attempt to explain what makes these historical episodes the sorts of "wrongs" that potentially merit redress.<sup>26</sup>

Martha Minow's excellent volume, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, proceeds from the same premise.<sup>27</sup> "This book explores how some nations have searched for a formal response to atrocity, some national or international re-framing of the events," explains Minow in the book's introduction.<sup>28</sup> The book's very subtitle makes her premise clear: its two factual predicates—"genocide" and "mass violence"—leave no space for disagreement over whether a wrong occurred. Injustice is simply (and, in the cases of genocide and mass violence, undoubtedly correctly) assumed; Minow's question is how to steer a path "between vengeance and forgiveness" in reconciliation efforts in injustice's wake.

The same premise supports Jeremy Waldron's influential and challenging essay, *Historic Injustice: Its Remembrance and Supersession*.<sup>29</sup> Unlike many other scholars who write about reparations, Waldron is not particularly supportive of non-symbolic compensatory reparations for historic injustices.<sup>30</sup> But Waldron's reason for opposing reparations is not that he questions the existence or the definition of underlying historic injustices.<sup>31</sup> Quite the opposite is true. "Historic injustice" is not merely the premise but the *title* of his essay, and he begins

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<sup>25</sup> One slight exception to this statement is Alan Cairns's contribution to this volume. See Alan Cairns, *Coming to Terms with the Past*, in *POLITICS AND THE PAST*, *supra* note 23, at 63–90. Cairns writes broadly of the need to "come to terms with the past," which entails "seeing the behavior of our predecessors, and sometimes of our earlier selves, in terms of its consequences for contemporary generations." *Id.* at 66. He also emphasizes the importance of "the scholarly recovery and interpretation of historical facts, including the identification of who did what to whom"—"the prosaic, yet noble, goal of finding out what happened." *Id.* at 70. Cairns does not, however, suggest any sort of method for such an inquiry, nor any way of distinguishing historical wrong from right. See *id.* at 63–90.

<sup>26</sup> See generally *POLITICS AND THE PAST*, *supra* note 23.

<sup>27</sup> See generally MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998).

<sup>28</sup> *Id.* at 2.

<sup>29</sup> See Jeremy Waldron, *Historic Injustice: Its Remembrance and Supersession*, in *JUSTICE, ETHICS, AND NEW ZEALAND SOCIETY* 139, 139–70 (Graham Oddie & Roy Perrett eds., 1992).

<sup>30</sup> Waldron does, however, support efforts at redress that he deems symbolic rather than compensatory. The federal government's token redress payments of \$20,000 to surviving Japanese American internees is an example of the sort of symbolic reparations that Waldron supports. See *id.* at 143.

<sup>31</sup> Waldron argues that changes in the circumstances of the descendants of the wrongdoer, the victim, and third parties result in the supersession of the underlying wrong, and that compensatory reparations are therefore unjust. See *id.* at 159–66.



by writing: "In reviewing our history, we come across events *that can only be described as injustices*."<sup>32</sup> This is not an essay that entertains doubt about what constitutes a potentially compensable wrong. "People, or whole peoples, were attacked, defrauded, and expropriated," Waldron reports; "their lands were stolen and their lives were ruined."<sup>33</sup> Waldron's question is not whether these were in fact instances of injustice; instead he asks, "As we become aware of these injustices, what are we to *do* about them?"<sup>34</sup>

Mari Matsuda's seminal treatment of reparations, *Looking to the Bottom: Critical Legal Studies and Reparations* similarly slights the question of how to define a compensable historical injustice.<sup>35</sup> Matsuda contemplates reparations for "racist acts,"<sup>36</sup> but does not define them further. She also writes aspirationally of "physical liberty from constraint of the person"; "freedom from life-threatening abuse as well as the right to seek the nurturance and livelihood human beings need for survival"; rights to "personhood and participation—the recognition of one's existence as a human being, free and equal, with power and control over the political processes that govern one's life"; "freedom from public and private racism[;] freedom from inequalities of wealth distribution[;] and freedom from domination by dynasties."<sup>37</sup> Nowhere, however, does Matsuda establish that the intentional or unintentional denial of these privileges and freedoms at any particular point in American history was (or will be) an episode that would cause a redressable injury to accrue.<sup>38</sup>

To its credit, the most comprehensive edited volume in the legal literature on reparations recognizes that a historic injustice cannot be assumed, but must be proven.<sup>39</sup> Roy L. Brooks, the volume's editor, identifies five requirements for "a meritorious redress claim," the first

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<sup>32</sup> *Id.* at 139 (emphasis added).

<sup>33</sup> *Id.*

<sup>34</sup> Waldron, *supra* note 29, at 139.

<sup>35</sup> See generally Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

<sup>36</sup> *Id.* at 390.

<sup>37</sup> *Id.* at 389-90.

<sup>38</sup> Writing in the mid-1980s, as the movement for Japanese American redress was gathering steam, Matsuda may have assumed a growing consensus about the injustice of at least some episodes in American history, such as the Japanese American internment. Sadly, however, Michelle Malkin's popular book justifying the internment shows that any such optimism was misplaced. See generally MALKIN, *supra* note 6.

<sup>39</sup> See Roy L. Brooks, *Introduction to WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* 1, 7 (Roy L. Brooks ed., 1999) [hereinafter Brooks, *Introduction to WHEN SORRY ISN'T ENOUGH*].

two of which are that "a human injustice must have been committed" and that "it must be well-documented."<sup>40</sup> Brooks does not leave matters there; he defines his terms.<sup>41</sup> But perplexingly, Brooks anchors his definition of a historical "human injustice" in the present day. Brooks begins with Article 55(c) of the Charter of the United Nations (the "U.N."), which commits the U.N. to the promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>42</sup> He adds to that the "various multilateral and bilateral conventions, covenants, resolutions, and treaties" that "more sharply define the rights of all humans," as well as the prohibitions of customary international law.<sup>43</sup> In sum, he states that a historical human injustice is simply "the violation or suppression of human rights or fundamental freedoms recognized by international law."<sup>44</sup>

Brooks deserves credit for attending to the problem of defining historical injustice, something other scholars ignore. But surely the definitional problem cannot be as focused in the present as Brooks makes it out to be. Debates about reparations are typically about past, not present, wrongdoing.<sup>45</sup> This is certainly true in the American context. Our great reparations debates are, and will continue to be, about conduct that is generations old: slavery, Jim Crow, the eviction of American Indians from their native lands, and the decimation of the American Indian population and culture.<sup>46</sup> Various devastating effects of these old American policies linger to the present day, but the primary human choices that created them and nourished them in their

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<sup>40</sup> *Id.* (citing Matsuda, *supra* note 35, at 362–97).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (quoting U.N. Charter art. 55, para. c).

<sup>43</sup> *Id.*

<sup>44</sup> See Brooks, *Introduction to WHEN SORRY ISN'T ENOUGH*, *supra* note 39, at 3–11. In a slightly more recent work, Professor Brooks modified his approach, contending that reparations "apply only to certain types of wrongs, to wit, gross violations of fundamental international human rights, such as slavery, genocide, and Apartheid." Roy L. Brooks, *Getting Reparations for Slavery Right—A Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251, 255 (2004) (emphasis added) [hereinafter Brooks, *Getting Reparations for Slavery Right*]. Claims for reparations, Brooks argued, "characteristically arise only in the context of an atrocity." *Id.* The leading American example of reparations, however, is the Japanese American internment—a deep injustice and a civil liberties disaster, to be sure, but not what the word "atrocity" typically connotes.

<sup>45</sup> To be sure, some wrongdoing—the genocide in Rwanda, for example—is sufficiently recent to be controlled by current treaties, human rights law, and modern customary international law. See MINOW, *supra* note 27, at 122–31 (discussing modern use and shortcomings of international war crimes tribunals and truth commissions).

<sup>46</sup> This list is illustrative, not exhaustive.

infancy are decades, even centuries, old. It is, to say the least, deeply contestable to maintain that the international human rights law of the year 2006 should govern our inquiry into the extent to which, for example, seventeenth-century slave ownership or nineteenth-century American Indian policy was an injustice in its own time.

Naturally, we might choose to create systems of redress for these episodes without regard for whether they were unjust in their own time. We might create such systems for what Jeremy Waldron calls the "symbolic function of embodying . . . remembrance,"<sup>47</sup> or we might do so for a variety of essentially present-focused or forward-looking reasons.<sup>48</sup> We might choose to redress past suffering to make a statement about what our present values are, regardless of what our predecessors' values were, or to foster political reconciliation. But to the extent that our reasons for creating such systems are essentially backward-looking—that is, to the extent that they are compensatory and predicated on a debt or obligation that accrued in the past and survives to this day—we must confront the question of whether a perpetrator's conduct was wrong in its day.

For this task, current-day human rights law will often be beside the point. For example, Brooks includes the following on his list of potentially redressable historic injustices:

genocide; slavery; extrajudicial killings; torture and other cruel or degrading treatment; arbitrary detention; rape; the denial of due process of law; forced refugee movements; the deprivation of a means of subsistence; the denial of universal suffrage; and discrimination, distinction, exclusion, or preference based on race, sex, descent, religion, or other identifying factor with the purpose or effect of impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, social, economic, cultural, or any other field of public life.<sup>49</sup>

It is troubling enough that a few of the listed behaviors, especially those toward the bottom of the list, are not condemned under *current*

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<sup>47</sup> See Waldron, *supra* note 29, at 143.

<sup>48</sup> Professor Brooks helpfully distinguishes among various backward- and forward-looking approaches to redress in *Getting Reparations for Slavery Right*. See Brooks, *Getting Reparations for Slavery Right*, *supra* note 44, at 269–86.

<sup>49</sup> Brooks, *Introduction to WHEN SORRY ISN'T ENOUGH*, *supra* note 39, at 7.

law.<sup>50</sup> But many more of the items on the list would not have raised concerns of injustice in countless societies through much of human history. And at least one important item on the list—"the denial of due process of law"—has meant vastly different things at different moments in American history.<sup>51</sup> A "denial of due process of law" defies understanding as a historical injustice except by reference to the historical era in which it occurred.<sup>52</sup>

Of course, the mere fact that earlier generations may have endorsed or condoned certain practices should not by itself prevent us from seeing them as historical injustices. It is precisely the goal of this Article to stimulate thinking and debate about which historical practices, although condoned in their day, ought nonetheless to qualify as potentially redressable injustices. But careful analysis and debate are necessary—rather than merely invoking modern legal standards—if reparations theory is to avoid the risks of presentism and hindsight judgment that can skew our assessment of the acts of earlier generations.

## II. THE DANGER ILLUSTRATED: THE EXAMPLE OF THE JAPANESE AMERICAN INTERNMENT

The absence of a definition of historical injustice is not a mere conceptual flaw in reparations theory. It is a structural weakness that threatens the integrity of the entire project of compensatory reparations. No episode of American historical injustice illustrates the danger as vividly as the incarceration<sup>53</sup> of Japanese Americans during World War II and the successful—but newly questioned—movement to obtain reparations for surviving internees.<sup>54</sup>

The underlying story of historical injustice is well known. In early 1942, after intense lobbying by West Coast racial nativists, economic

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<sup>50</sup> For example, in many instances American law does not forbid governments from taking action along lines of race, gender, or religion, with a disparate effect but no discriminatory purpose. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239–40 (1976).

<sup>51</sup> See Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 29–31 (1992).

<sup>52</sup> See *id.*

<sup>53</sup> This Article will interchangeably refer to the wartime detention of Japanese Americans by its popular, albeit inaccurate, name—"internment"—and by the accurate term "incarceration." For a perceptive discussion of the importance of accurate nomenclature in speaking and writing about this episode, see Roger Daniels, *Words Do Matter: A Note on Inappropriate Terminology and the Incarceration of the Japanese Americans*, in *NIKKEI IN THE PACIFIC NORTHWEST: JAPANESE AMERICANS AND JAPANESE CANADIANS IN THE TWENTIETH CENTURY* 190, 190–214 (Louis Fiset & Gail M. Nomura eds., 2005).

<sup>54</sup> See ROGER DANIELS, *ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850*, at 331–41 (1988) (describing development of the Japanese American redress movement).

competitors of Japanese farmers, hysterical newspaper columnists, and elected officials, the federal government evicted all people of Japanese ancestry from their homes in a wide strip along the Pacific Coast and forced them into detention behind barbed wire.<sup>55</sup> Nearly 120,000 people were displaced, two-thirds of whom were U.S. citizens.<sup>56</sup> No legal process of any sort accompanied this mass exclusion or the multi-year incarceration that followed.<sup>57</sup> The government's stated theory was that each and every one of these people—citizen and alien, child and adult, the orphaned, the disabled, and the terminally ill—were members of an “enemy race” and, therefore, potential spies and saboteurs.<sup>58</sup>

It was not until the mid-1970s—three decades after the last of the internees emerged from behind barbed wire—that survivors and their children began to press for a government inquiry into how the oppressive wartime policy came about.<sup>59</sup> That pressure resulted in the establishment in 1980 of the Commission on Wartime Relocation and Internment of Civilians (the “Commission”), a blue-ribbon and bipartisan panel of political leaders, administrators, judges, community leaders, and scholars that was to investigate the government's wartime policies and report its findings to Congress.<sup>60</sup> The Commission held twenty days of public hearings and delved deeply into archival holdings during a comprehensive investigation which lasted almost two years.<sup>61</sup> In February of 1983, the Commission issued its unanimous report to Congress, concluding that the policy of excluding Japanese Americans from the West Coast “was not justified by military necessity” and that the long-term mass detention that followed was “not

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<sup>55</sup> Excellent accounts of the decision-making process that led to the exclusion and incarceration of Japanese aliens and American citizens of Japanese ancestry include ROGER DANIELS, *CONCENTRATION CAMPS USA: JAPANESE AMERICANS AND WORLD WAR II* (1972); PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* (1983); TETSUDEN KASHIMA, *JUDGMENT WITHOUT TRIAL: JAPANESE AMERICAN IMPRISONMENT DURING WORLD WAR II* (2003); GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* (2001).

<sup>56</sup> See KASHIMA, *supra* note 55, at 4.

<sup>57</sup> See *id.* at 48–66.

<sup>58</sup> See Memorandum from Lt. Gen. John L. DeWitt to Sec'y of War Henry Stimson (Feb. 13, 1942), available at <http://www.unc.edu/~emuller/isthatlegal/DeWitt1.jpg>, <http://www.unc.edu/~emuller/isthatlegal/DeWitt2.jpg>.

<sup>59</sup> Roger Daniels has summarized the background of the redress movement. DANIELS, *supra* note 54, at 331–41.

<sup>60</sup> See Tetsuden Kashima, *Foreword to COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED*, at i, xvi–xvii (Civil Liberties Pub. Educ. Fund ed., 1997) (1982).

<sup>61</sup> *Id.* at xvii.

driven by analysis of military conditions.”<sup>62</sup> “The broad historical causes which shaped these decisions,” said the Commission, “were race prejudice, war hysteria and a failure of political leadership.”<sup>63</sup>

The Commission also recommended a number of remedial actions to Congress “as an act of national apology.”<sup>64</sup> These included legislation “recogniz[ing] that a grave injustice was done and offer[ing] the apologies of the nation for the acts of exclusion, removal and detention”; presidential pardons for Japanese Americans convicted of resisting exclusion and internment; liberal administrative review of Japanese American claims for restitution for lost positions, status, or entitlements; the creation of an educational and humanitarian foundation; and a “one-time per capita compensatory payment of \$20,000” to each surviving internee.<sup>65</sup> Five years later, after extensive lobbying and debate, the Commission’s five recommendations became law when President Reagan signed the Civil Liberties Act of 1988.<sup>66</sup> In 1990, President Bush issued a formal apology and the government sent out the first \$20,000 redress checks.<sup>67</sup>

The success of the Japanese American redress movement made it a sort of “poster child” of American reparations theory—a “monumental,” even “unique” political achievement<sup>68</sup> that had, and continues to have, the potential to serve as a model for the redress claims of other victims of historical injustices.<sup>69</sup> Yet that success has also placed the movement for Japanese American redress in the crosshairs of the partisan historical revisionists. For a time, the revisionist efforts sat at the fringes of public discourse, appearing mostly in vanity-press books<sup>70</sup> and Internet discussions. In 2004, however, Fox News commentator Michelle Malkin grabbed these fringe critiques and thrust them before the eyes and ears of millions of readers, television view-

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<sup>62</sup> *Id.* at xvii; PERSONAL JUSTICE DENIED, *supra* note 60, at 18.

<sup>63</sup> PERSONAL JUSTICE DENIED, *supra* note 60, at 18.

<sup>64</sup> *Id.* at 462.

<sup>65</sup> See *id.* at 462–66. Commissioner Daniel Lungren, a U.S. Representative from California, dissented from the last of these recommendations. See *id.*

<sup>66</sup> Pub. L. No. 100-383, 102 Stat. 903 (1988).

<sup>67</sup> See KASHIMA, *supra* note 55, at 221.

<sup>68</sup> Roy L. Brooks, *Japanese American Redress and the American Political Process: A Unique Achievement?*, in WHEN SORRY ISN'T ENOUGH, *supra* note 39, at 162.

<sup>69</sup> See generally Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477 (1998).

<sup>70</sup> See generally DAVID D. LOWMAN, *MAGIC: THE UNTOLD STORY OF U.S. INTELLIGENCE AND THE EVACUATION OF JAPANESE RESIDENTS FROM THE WEST COAST DURING WWII* (2000); KEITH ROBAR, *INTELLIGENCE, INTERNMENT AND RELOCATION: ROOSEVELT'S EXECUTIVE ORDER 9066: HOW TOP SECRET "MAGIC" INTELLIGENCE LED TO EVACUATION* (2000).

ers, and radio listeners with her best-selling book *In Defense of Internment*<sup>71</sup> and her many book-related radio and television appearances.

Those who oppose reparations for historical injustices typically have a number of arguments at their disposal: the perpetrators are long dead, or the victims are long dead, or no non-arbitrary class of victims can be designated, or too many decades or centuries have passed to allow a rational calculation of compensation, or the wrongs were insufficiently documented.<sup>72</sup> In the case of the Japanese American internment, these usual arguments fail: some perpetrators and victims were (and are) still alive, redress payments went only to those personally affected by the unjust policy, and the injuries are well documented and remain in the memories of people still living.<sup>73</sup> The revisionist strategy must therefore be more direct: it must challenge the premise that a redressable injury ever occurred. It must maintain that the Japanese American internment was justified.

That is precisely the argument that Malkin's book makes. Its self-described mission is to "debunk[] the great myth of the 'Japanese American internment' as 'racist' and 'unjustified.'"<sup>74</sup> Its "central thesis . . . is that the national security measures taken during World War II were justifiable, *given what was known and not known at the time*."<sup>75</sup> These measures were "not based primarily on racism and wartime hysteria,"<sup>76</sup> the book maintains, but rather were military reactions to a handful of top-secret decoded Japanese diplomatic messages that suggested Japanese efforts to recruit Japanese American spies on the West Coast.<sup>77</sup> They were reasoned decisions by "serious men, aware of the gravity of both their actions and inaction"—men who "did not have the luxury of a rearview mirror."<sup>78</sup>

This last point is the book's springboard from justifying internment to assaulting redress. According to Malkin, the Commission on Wartime Relocation and Internment of Civilians issued "a false account" of the historical episode.<sup>79</sup> It did so because of intimidation by

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<sup>71</sup> See generally MALKIN, *supra* note 6.

<sup>72</sup> See Brophy, *supra* note 2, at 501–25.

<sup>73</sup> See DANIELS, *supra* note 54, at 340 (explaining that the Japanese American redress program provided a one-time per capita compensatory payment to each of the survivors of the relocation).

<sup>74</sup> MALKIN, *supra* note 6, at xii.

<sup>75</sup> *Id.* at xxxiii.

<sup>76</sup> *Id.* at 80.

<sup>77</sup> *Id.* at 37–51, 78–80.

<sup>78</sup> *Id.* at xxxiv.

<sup>79</sup> MALKIN, *supra* note 6, at 115.

the "America-bashing"<sup>80</sup> Japanese American redress movement, a group of "civil rights absolutists and ethnic lobbyists . . . with an intellectual arrogance that only 20/20 hindsight can instill."<sup>81</sup> According to Malkin, the redress movement fell victim to "the danger of judging the wartime measures after the fact and out of historical context,"<sup>82</sup> and ignored the "risks of sabotage and espionage" that "reasonable men" of that day "vividly perceived."<sup>83</sup> For Malkin, the nub of the problem is hindsight: the exclusion and internment of 120,000 people were the justified judgments of their era's reasonable minds.<sup>84</sup> Such judgments reflected wisdom, not injustice—and wisdom needs no apology.<sup>85</sup>

It is not the concern of this Article to establish the incompleteness, the illogic, the deceptiveness, and the outright falsehood of Malkin's historical account.<sup>86</sup> What is important is the danger that Malkin's method poses for reparations theory and practice. Reparations theory sits atop an assumption that American history includes episodes of injustice—policies and behaviors that were wrong in their time, and whose traumatizing, stigmatizing, and impoverishing effects linger to the present day. Actual reparations movements depend upon something approaching political consensus that such episodes occurred. Even for such horrific chapters as slave ownership, the suppression of indigenous peoples and cultures, and mass racial internment, the consensus that these were unambiguous instances of injustice is, in the context of American history, recent. Partisan historical revisionism of the sort preached in Malkin's *In Defense of Internment* tears a hole in that consensus, and accordingly, the structure built upon the consensus weakens.

It is time for scholars to begin to fill that hole.

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<sup>80</sup> *Id.* at 116.

<sup>81</sup> *Id.* at xxxiv.

<sup>82</sup> *Id.* at 118.

<sup>83</sup> *Id.* (quoting James J. Kilpatrick, Op-Ed., *\$1.2-billion Worth of Hindsight*, ST. PETERSBURG TIMES, Mar. 8, 1988, at 19A.)

<sup>84</sup> See MALKIN, *supra* note 6, at xxxiii-xxxv.

<sup>85</sup> See *id.*

<sup>86</sup> That work has been amply done elsewhere. See Postings of Eric L. Muller and Greg Robinson to The Volokh Conspiracy and IsThatLegal? blogs, [http://www.isthatlegal.org/Muller\\_and\\_Robinson\\_on\\_Malkin.html](http://www.isthatlegal.org/Muller_and_Robinson_on_Malkin.html) (last visited Aug. 24, 2006).



### III. TRYING OUT AN ANALOGY: THE CULTURAL DEFENSE AND THE "TEMPORAL DEFENSE"

In which discipline should the hole-filling project occur? Thus far, the problem of defining historical injustice seems to have fallen through the gaps between disciplines. Legal scholars have been content either to assume consensus about historical injustice or to use presentist definitions that ignore the considerable problem of hindsight.<sup>87</sup> Historians are typically more concerned with explaining why people acted as they did than with condemning particular policies and choices.<sup>88</sup> And philosophers have paid scant attention to the problem.

Because the problem of defining historical injustice sits at the intersection of law, history, and philosophy, the project will best proceed as a cross-disciplinary effort. This Article, however, seeks to begin the dialogue by positing an analogy between the problem of defining historical injustice and the well-known criminal law problem of judging the wrongdoing of immigrants from foreign cultures. The analogy is admittedly imperfect, and does not single-handedly resolve the difficulties of defining historical injustice. It is, however, a provocative and helpful start.

Consider the following story: John and his lover Sara are from a different culture from our own. John learns that Sara has had sex with another man. In John and Sara's culture, a woman's sexual infidelity is a grave insult to a man's honor. Their culture also tolerates corporal punishment for such betrayals. John therefore gives Sara ten lashes across the back with a whip. The trouble for John, however, is that he and Sara no longer live in their culture of origin; they live in the United States. Under twenty-first-century American law, John's actions constitute the felony of aggravated battery.<sup>89</sup>

John's case starkly presents the problem of the "cultural defense" in the criminal law. Everyone called upon to assess John's culpability—from the police officer who arrests and charges him, to the prosecutor who negotiates with his lawyer for a possible guilty plea, to the jurors who determine his guilt or innocence, to the judge who ultimately sentences him—will have to decide whether and to what

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<sup>87</sup> See *supra* notes 23–52 and accompanying text.

<sup>88</sup> See TREVOR BURNARD, *MASTERY, TYRANNY, & DESIRE: THOMAS THISTLEWOOD AND HIS SLAVES IN THE ANGLO-JAMAICAN WORLD* 31 (2004) ("As historians, it is not our responsibility to attribute retrospective blame.").

<sup>89</sup> See *State v. Bell*, 647 So. 2d 498, 500 (La. Ct. App. 1994) (beating with a stick constitutes aggravated battery).

extent the norms of John's society of origin should extinguish or diminish John's culpability for whipping Sara. Do we treat John fairly if we assess his conduct by reference to our cultural standards rather than his? If, in fairness to John, we use his cultural standards rather than ours, do we compromise our efforts to deter crime and thereby place potential victims—especially powerless and vulnerable victims—at greater risk?

Now let us change one aspect of John's case: John's native society is not a foreign country, but rather eighteenth-century America. He is a plantation owner, and Sara is not just his lover, but also his slave. Their culture is the culture of that day. What has brought John and Sara to us is not a ship or an airplane, but rather the passage of time. We are historians, looking back on John and Sara from our early-twenty-first-century vantage point and trying to determine John's culpability for whipping Sara for her sexual infidelity 200 years ago.

Intriguing questions very similar to those raised by the criminal law's cultural defense now arise. As we assess the conduct and practices of an earlier generation, to what extent should we be bound by that earlier society's norms? To be fair to John, must we credit what we might call his "temporal defense"—that is, must we assess his behavior by reference to the standards of his day? Can we avoid judging John's acts according to our own standards without undermining our efforts to deter the type of misdeed that John committed? In sparing John from judgment, do we make current and future generations of potential victims more vulnerable to a rein infliction of the same type of harm that John caused long ago?

Note how powerfully these questions resonate with the defensive strategies of the partisan historical revisionists. Michelle Malkin's case for Franklin Roosevelt and his top military advisers is an instance of what this Article terms a "temporal defense." She maintains that we commit an injustice against our World War II leaders when we assess their policy of Japanese American exclusion and detention from our modern vantage point.<sup>90</sup> We must assess it from *theirs*, and when we do so, she maintains, it emerges as a reasonable military judgment rather than the product of racism and hysteria.<sup>91</sup>

The analogy between cultural and temporal defense is striking, and this Article maintains that it can teach us a great deal about how to think about historical injustice. It bears emphasis, however, that the

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<sup>90</sup> See MALKIN, *supra* note 6, at xxxiii–xxxv.

<sup>91</sup> See *id.*

analogy of culture to time is far from perfect. Three difficulties quickly present themselves, and they are all apparent in the story about John and Sara. First, Immigrant John has presumably chosen to join our culture and might therefore be more fairly saddled with judgment by our culture's norms; Historical John made no such choice. Second, Immigrant John, by virtue of his actual physical presence among us, has access to the behavioral and moral norms of our society, can learn and follow them if he chooses, and is fairly condemned if he does not do so; Historical John is stuck in his moment in the past and cannot know or follow the norms of today's society. Finally, a message of forgiveness to Immigrant John (and his cultural community in the United States) will pose clear and direct risks to people living today—most immediately Sara, who will be left at John's mercy if his conduct is excused. But to speak of "sending a message" to Historical John and members of his generation is incoherent; they are dead and gone. Any risk that excusing their misconduct poses to current or future generations is therefore remote.

These objections based on choice, access, and risk are considerable, but they should not doom this Article's goal of launching a discussion about defining historical injustice. On careful examination, each of the flaws in the analogy between culture and time is a bit less problematic than it initially appears. Consider first the problem of choice. Although it is true that many immigrants freely choose to come to the United States, immigration is not an unfettered choice for all immigrants. Some immigrants come here because danger effectively forces them to quit their native lands.<sup>92</sup> Many others, particularly dependent spouses, children, and elderly parents come here because a more powerful family decisionmaker has decided to do so. On the other hand, although people from earlier times do not really choose to "appear" at this (or any) particular moment in history, they also really have no choice *but* to do so. Time marches on. People understand that later generations will scrutinize the choices they make and the actions they take. Thus, especially if Immigrant John has fled to the United States to save his life, or if he has been brought here by someone else, his position with respect to the norms of today's dominant culture is more like Historical John's than it may first appear.

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<sup>92</sup> The Hmong, who are the source of many cultural defense cases, are a good example of this: by virtue of their support for the United States and South Vietnam during the conflict with North Vietnam, it was dangerous for them to stay in Vietnam after the South fell. See TIM PFAFF, *HMONG IN AMERICA: JOURNEY FROM A SECRET WAR* 49–63 (1995).

Consider next the objection based on cultural access. For many immigrants from cultures with practices that diverge significantly from American behavioral norms, the American majority's culture is often not especially accessible or intelligible. Many first-generation immigrants (and in some communities, even later-generation immigrants) live culturally insular lives.<sup>93</sup> Economic, religious, linguistic, and social barriers and preferences can keep them well apart from the mainstream culture. By contrast, historical figures from the previous one or two generations whose actions are later challenged typically stand well within the cultural mainstream because the mainstream changes slowly over time and usually conforms with at least faintly visible trends. As between, say, a Vietnamese immigrant who has lived entirely within San Francisco's Chinatown since arriving three months ago and an American political figure from the World War II era, it is not at all clear that the Chinese immigrant is able to develop a clearer sense of current American cultural norms than the World War II leader might have been able to extrapolate.

Consider finally the objection based on risk. On careful examination, the risk of excusing conduct that is approved or condoned in a different culture is similar to the risk of excusing conduct that was approved or condoned at an earlier time. In both cases, the excuse endangers those who might again be victimized by the sort of behavior that first caused injury. In the case of the cultural defense, there are two potential groups of perpetrators and victims, one narrow and one broad. The narrow group is the accused person himself and the person or people he allegedly victimized. The broader group includes other potential perpetrators, who might be encouraged to act if they learn that American law condones a violent or harmful cultural practice, as well as the larger class of potential victims of that cultural practice. Similarly, the temporal defense also involves both a narrow and a broad class of perpetrators and victims. The narrow class of perpetrators and victims has of course passed away. But the broader class remains—and this is the very heart of George Santayana's famous warn-

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<sup>93</sup> See generally RICHARD ALBA & VICTOR NEE, *REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION* (2003) (comparing assimilation patterns among modern immigrant groups with those of earlier waves of immigrants to the United States); ALEJANDRO PORTES & RUBÉN RUMBAUT, *LEGACIES: THE STUDY OF THE IMMIGRANT SECOND GENERATION* (2001) (analyzing assimilation of second-generation immigrants); Rubén G. Rumbaut, *The Crucible Within: Ethnic Identity, Self-Esteem, and Segmented Assimilation Among Children of Immigrants*, 28 INT'L MIGRATION REV. 748 (1994) (studying the psychosocial adaptation of children of recent immigrants to the United States).

ing that those who cannot remember the past are condemned to repeat it.<sup>94</sup> To say that some past victimization was understandable, or even perhaps justified under the circumstances, is to invite that sort of victimization to recur if and when those types of circumstances reappear. Why else were Arab American groups among the first and loudest to complain<sup>95</sup> when U.S. Representative from North Carolina Howard Coble said, after September 11, 2001, that he thought the incarceration of Japanese Americans during World War II was justified?<sup>96</sup> Undoubtedly, the risks the cultural defense poses to potential victims are more immediate and palpable than the risks of the temporal defense. The difference, however, is one of degree, not kind.

To be sure, the analogy between the cultural defense and its temporal cousin is imperfect; judgment in a court of law is not the same as judgment in the court of history. But the analogy does not need to be perfect. It is not the goal of this Article to maintain that the standards of the criminal law should strictly govern our reflection on history. Rather, this Article's purpose is to initiate conversation about the undertheorized problem of defining historical injustice. Its claim is simply that the criminal law's cultural defense offers tools for working through a set of problems similar to those we encounter when we attempt to assess the wrongdoing of those who went before us. Let us therefore examine the cultural defense and the progress the criminal law has made toward solving those problems.

#### IV. THE RISKS AND BENEFITS OF CULTURAL AND TEMPORAL EXCUSES

The cultural defense in the criminal law is the subject of a fairly rich literature, most of it less than twenty years old.<sup>97</sup> That literature

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<sup>94</sup> See George Santayana, *Reason in Common Sense* (1905), reprinted in *THE LIFE OF REASON: OR THE PHASES OF HUMAN PROGRESS* 284 (2d ed. 1936).

<sup>95</sup> See ProIslam.com, Howard Coble Supports Internment, [http://www.proislam.com/letter\\_against\\_coble.htm](http://www.proislam.com/letter_against_coble.htm) (last visited Aug. 24, 2006) (urging that Coble resign as Chair of House Subcommittee on Crime, Terrorism, and Homeland Security).

<sup>96</sup> See *Republican Defends WWII Internments*, CBSNews.com, Feb. 6, 2003, <http://www.cbsnews.com/stories/2003/02/07/politics/main539755.shtml>.

<sup>97</sup> See generally Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053 (1994); Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093 (1996); Rashmi Goel, *Can I Call Kimura Crazy? Ethical Tensions in the Cultural Defense*, 3 SEATTLE J. FOR SOC. JUST. 443 (2004); Kim, *supra* note 9; Anh T. Lam, *Culture as a Defense: Preventing Judicial Bias Against Asians and Pacific Islanders*, 1 ASIAN AM. PAC. ISLANDS L.J. 49 (1993); Maguigan, *supra* note 15; Kelly M. Neff, *Removing the Blinders in Federal Sentencing: Cultural Difference as a Proper Departure Ground*, 78 CHI.-KENT L. REV. 445 (2003); Alison Dundes

is, perhaps not surprisingly, marked by disagreement. Something approaching agreement has emerged, however, on a couple of points. First, most scholars now agree that a new, full-blown defense to criminal liability grounded in cultural difference is a bad idea.<sup>98</sup> And second, most scholars now agree that evidence of cultural practices ought to be admitted, on a case-by-case basis, to support certain existing criminal law defenses.<sup>99</sup>

The boundaries of the debate over the criminal law's cultural defense were marked in two law review pieces published in 1986. One, a student note published in the *Harvard Law Review*, presented an unabashed plea for the recognition of a formal cultural defense that would completely exonerate people who, through their cultural practices, commit criminal acts.<sup>100</sup> The note's author contended that a defense based in cultural difference is a necessary and sensible way of honoring the nation's commitments to cultural pluralism and to individualized justice.<sup>101</sup> "A new immigrant," the author explained, "has not been given the same opportunity [as a long-term resident] to ab-

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Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437 (1993); Valerie L. Sacks, *An Indefensible Defense: On the Misuse of Culture in Criminal Law*, 13 ARIZ. J. INT'L & COMP. L. 523 (1996); Sharan K. Suri, *A Matter of Principle and Consistency: Understanding the Battered Woman and Cultural Defenses*, 7 MICH. J. GENDER & L. 107 (2000); Volpp, *supra* note 9; Wanderer & Connors, *supra* note 12; Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986); Michaël Fischer, Note, *The Human Rights Implications of a "Cultural Defense"*, 6 S. CAL. INTERDISC. L.J. 663 (1998); Taryn F. Goldstein, Comment, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?*, 99 DICK. L. REV. 141 (1994); Neal A. Gordon, Note, *The Implications of Memetics for the Cultural Defense*, 50 DUKE L.J. 1809 (2001); Andrew M. Kanter, Note, *The Yenaldlooshi in Court and the Killing of Witch: The Case for an Indian Cultural Defense*, 4 S. CAL. INTERDISC. L.J. 411 (1995); Jisheng Li, Comment, *The Nature of the Offense: An Ignored Factor in Determining the Application of the Cultural Defense*, 18 U. HAW. L. REV. 765 (1996); Alison Matsumoto, Comment, *A Place for Consideration of Culture in the American Criminal Justice System: Japanese Law and the Kimura Case*, 4 J. INT'L L. & PRAC. 507 (1995); Julia P. Sams, Comment, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L. 335 (1986); Sikora, *supra* note 15; James J. Sing, Note, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845 (1999); Sharon M. Tomao, Note, *The Cultural Defense: Traditional or Formal?*, 10 GEO. IMMIGR. L.J. 241 (1996); Michele Wen Chen Wu, Comment, *Culture Is No Defense for Fanticide*, 11 AM. U. J. GENDER SOC. POL'Y & L. 975 (2003).

<sup>98</sup> See generally Coleman, *supra* note 97; Evans-Pritchard & Renteln, *supra* note 13; Kim, *supra* note 9; Maguigan, *supra* note 15; Renteln, *supra* note 97; Sacks, *supra* note 97; Volpp, *supra* note 9; Goldstein, *supra* note 97; Sikora, *supra* note 15; Wu, *supra* note 97.

<sup>99</sup> See generally Coleman, *supra* note 97; Evans-Pritchard & Renteln, *supra* note 13; Kim, *supra* note 9; Maguigan, *supra* note 15; Renteln, *supra* note 97; Sacks, *supra* note 97; Volpp, *supra* note 9; Sikora, *supra* note 15; Wu, *supra* note 97.

<sup>100</sup> See Note, *The Cultural Defense in the Criminal Law*, *supra* note 97, at 1311.

<sup>101</sup> See *id.* at 1298-307.

sorb—through exposure to important socializing institutions—the norms underlying this nation's criminal laws."<sup>102</sup> The author conceded that a cultural defense might make it harder for the law to articulate a coherent social order and to deter crime, but countered that the effects might well be the opposite if immigrant groups came to recognize that the American legal system is sensitive to their cultural traditions.<sup>103</sup>

The other 1986 piece, a student comment by Julia P. Sams in the *Georgia Journal of International and Comparative Law*, presented a full-bore assault on the notion of a cultural defense.<sup>104</sup> Sams argued that a complete cultural defense to criminal liability would be difficult to administer because the legal system would have to decide which immigrant groups qualify for it and which do not, as well as who among the qualifying groups deserve it and who do not.<sup>105</sup> She further contended that a cultural defense would undermine the deterrent effect of the law by removing an important incentive for immigrant groups to learn American laws,<sup>106</sup> and would undermine the principle of legality by placing "newcomers' . . . opinions and ideas about the laws . . . above the laws as declared by the officials."<sup>107</sup> She also maintained that a cultural defense would be unfair to members of the cultural majority, to whom the defense would not be available.<sup>108</sup> Although she recognized that "immigrant groups . . . embellish society with their diverse customs and beliefs," she concluded that those advantages would be "nullified if United States residents are threatened by the crimes of newcomers who are excused from punishment."<sup>109</sup>

Since 1986, much has been written about the cultural defense.<sup>110</sup> Although the terrain remains contested, a middle ground has opened up between the two poles fixed by those early pieces. That middle ground does not include a new, free-standing complete defense for

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<sup>102</sup> *Id.* at 1299.

<sup>103</sup> *See id.* at 1304–07.

<sup>104</sup> *See generally* Sams, *supra* note 97.

<sup>105</sup> *See id.* at 345–48.

<sup>106</sup> *See id.* at 348–50.

<sup>107</sup> *Id.* at 352.

<sup>108</sup> *See id.* at 350–51.

<sup>109</sup> *See* Sams, *supra* note 97, at 353.

<sup>110</sup> *See generally* Coleman, *supra* note 97; Evans-Pritchard & Renteln, *supra* note 13; Kim, *supra* note 9; Maguigan, *supra* note 15; Neff, *supra* note 97; Renteln, *supra* note 97; Sacks, *supra* note 97; Volpp, *supra* note 9; Wanderer & Connors, *supra* note 12; Fischer, *supra* note 97; Goldstein, *supra* note 97; Sikora, *supra* note 15; Sing, *supra* note 97; Tomao, *supra* note 97; Wu, *supra* note 97.

cultural practices.<sup>111</sup> Most scholars agree that an independent complete cultural defense is both unnecessary and unwise.<sup>112</sup> It is unnecessary because existing law already takes important cultural determinants of a defendant's mental state into account.<sup>113</sup> And it is unwise for a number of reasons: the defense would, for example, undermine the maxim that ignorance of the law is no excuse, and would plunge the legal system into a messy and potentially offensive set of decisions about what counts as culture and who counts as a true cultural practitioner.<sup>114</sup>

But by far, the most important reason scholars have advanced for rejecting a free-standing cultural defense is that the defense would be perilous for crime victims, especially women and children.<sup>115</sup> A large percentage of cases involving the cultural defense are domestic abuse cases—prosecutions of adult men who batter or kill women with whom they are in relationships, and prosecutions of adult men and women who abuse or kill their children.<sup>116</sup> To exonerate abusers on the basis of a claim that their own culture does not condemn their violence would make that violence harder to deter.<sup>117</sup>

This poignant insight was apparent in the quoted reaction of one battered Chinese woman to *People v. Chen*, a case in which a male Chinese immigrant successfully invoked alleged Chinese cultural practices to win a sentence of probation for killing his adulterous wife.<sup>118</sup>

<sup>111</sup> See generally Coleman, *supra* note 97; Evans-Pritchard & Renteln, *supra* note 13; Kim, *supra* note 9; Maguigan, *supra* note 15; Renteln, *supra* note 97; Volpp, *supra* note 9; Sikora, *supra* note 15.

<sup>112</sup> The leading exception is Alison Dundes Renteln, who argues for what appears to be a free-standing cultural defense in her 2004 book, *The Cultural Defense*. RENTELN, *supra* note 14, at 200–01. I say that she argues for “what appears to be” a free-standing cultural defense because in actuality she believes that cultural evidence should be, and sometimes is, admitted in support of existing criminal law defenses. Indeed, her main reason for insisting on a free-standing cultural defense is what she views as the inappropriate reluctance of judges to accept cultural evidence in support of existing defenses. See *infra* notes 147–49 and accompanying text.

<sup>113</sup> See Wanderer & Connors, *supra* note 12, at 873; Sing, *supra* note 97, at 1863–70; Tomao, *supra* note 97, at 243–56.

<sup>114</sup> See Kim, *supra* note 9, at 110–15; Maguigan, *supra* note 15, at 44–45; Wanderer & Connors, *supra* note 12, at 873; Tomao, *supra* note 97, at 243–56.

<sup>115</sup> See generally Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311 (1991).

<sup>116</sup> See Coleman, *supra* note 97, at 1105–13; Kim, *supra* note 9, at 101–02; Wanderer & Connors, *supra* note 12, at 836–37; Sikora, *supra* note 15, at 1695–97.

<sup>117</sup> See Coleman, *supra* note 97, at 1136–44; Rimonte, *supra* note 115, at 1326; Sacks, *supra* note 97, at 541–42; Fischer, *supra* note 97, at 690–91; Sikora, *supra* note 15, at 1709–11.

<sup>118</sup> See Kim, *supra* note 9, at 119–21 (referencing *People v. Chen*, No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989)).



"Even thinking about that case makes me afraid," the battered woman explained. "My husband has told me: 'If this is the kind of sentence you get for killing your wife, I could do anything to you. I have the money for a good attorney.'"<sup>119</sup> This abused woman and many vulnerable women and children like her would be the ones to bear the brunt of a complete defense to criminal liability grounded in culture. Not surprisingly, most scholars agree that further disempowering those who are already vulnerable to violent attack is too high a price to expect them to pay for a legal doctrine that would exonerate their abusers.<sup>120</sup>

But just as the weight of scholarly opinion has rejected a complete cultural defense, it has also rejected the notion that cultural influences on a defendant's behavior ought to be irrelevant to guilt or innocence. Scholars have recognized that in some situations, evidence of cultural practices and beliefs might be relevant not to a new, complete cultural defense but to old and well-established ones, especially mistake of fact, lack of intent, and duress.<sup>121</sup> Consider, as an example, the case of a Vietnamese immigrant parent charged with child abuse for engaging in *cao gio*, or "coining"—the practice of massaging an ill child's back with a medicated oil, and then rubbing the back with the edge of a serrated coin.<sup>122</sup> If the child abuse statute requires proof of a specific intent to harm the child, then evidence that the parent engaged in *cao gio* in order to heal the child would be relevant—indeed, probably crucial—to the issue of intent. Similarly, in a rape prosecution, evidence of cultural practices surrounding sexual intercourse might tend to support a defendant's claim that he made a mistake about the fact of the victim's consent.<sup>123</sup> And a Yoruban immigrant from Nigeria who makes tribal markings with a razor blade on her

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<sup>119</sup> Alexis Jetter, *Fear Is Legacy of Wife Killing in Chinatown, Battered Asians Shocked by Husband's Probation*, NEWSDAY, Nov. 26, 1989, at 4.

<sup>120</sup> See Coleman, *supra* note 97, at 1136–44; Rimonte, *supra* note 115, at 1326; Sacks, *supra* note 97, at 541–42; Fischer, *supra* note 97, at 690–91; Sikora, *supra* note 15, at 1709–11.

<sup>121</sup> Kay L. Levine's excellent article *Negotiating the Boundaries of Crime and Culture* is especially useful on this point. See Kay L. Levine, *Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies*, 28 LAW & SOC. INQUIRY 39, 49–66 (2003). Holly Maguigan also has written an excellent article. See generally Maguigan, *supra* note 15.

<sup>122</sup> See Alison Dundes Renteln, *Is the Cultural Defense Detrimental to the Health of Children?*, in 7 LAW AND ANTHROPOLOGY: INTERNATIONAL YEARBOOK FOR LEGAL ANTHROPOLOGY 27, 39 (René Kuppe & Richard Potz eds., 1994).

<sup>123</sup> This fact pattern alludes to the California case of *People v. Moua*. See generally Evans-Pritchard & Renteln, *supra* note 13 (discussing and analyzing at length *People v. Moua*, No. 315972-0 (Cal. Super. Ct. Feb. 17, 1985)).

son's face might be able to offer a defense of necessity or duress if she can offer evidence that her culture predicted far greater harm to the child if he was not so marked.<sup>124</sup>

To be sure, authors have emphasized that it is important for prosecutors to make evidence available to the fact finder that counters or challenges defendants' cultural claims, in order to reduce the risk that fact finders will be tricked into mistaking willfully misogynist or child-abusive conduct for innocent cultural practice.<sup>125</sup> But the weight of scholarly opinion has rejected the claim that all evidence of cultural practice should be completely barred.<sup>126</sup> Instead, it has settled around the idea that cultural evidence ought to be admissible to support established legal defenses based on the defendant's mental state.<sup>127</sup>

These insights from the literature on the cultural defense offer us guidance on the problem of defining historical injustices. On the one hand, we benefit from the literature's firm recognition that cultural context sometimes ought to temper judgment. That recognition reassures us that our concern for the unfairness of judging with the benefit of hindsight stands on something more substantial than a taboo against speaking ill of the dead or a worry about how we will ourselves someday be judged.<sup>128</sup> The criminal law's recognition of the relevance of cultural context also highlights the importance of an actor's mental state at the time she acted. What that mental state might be for historical actors (as opposed to living criminal defendants) remains to be seen. For now, it is enough to note that the cultural defense offers support for the excusing instinct that is at the heart of its temporal cousin.

That support, however, is drastically limited by the near-universal insight in the criminal law literature that a freely available cultural defense imperils the powerless by undermining the deterrent effect of

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<sup>124</sup> See Renteln, *supra* note 122, at 29–30.

<sup>125</sup> See Maguigan, *supra* note 15, at 90–92.

<sup>126</sup> Perhaps the most hostile to any use of cultural evidence is Doriane Lambert Coleman. See Coleman, *supra* note 97, at 1103–04 nn.47–48 (discussing inherent flaws in the argument that custom could impair a defendant's ability to think rationally, and thus negate the mens rea requirement, but acknowledging that her discussion and analysis apply only to situations where cultural evidence is used to exonerate an "otherwise criminal defendant").

<sup>127</sup> See Maguigan, *supra* note 15, at 87–88; Sacks, *supra* note 97, at 547–50; Wu, *supra* note 97, at 1020–22.

<sup>128</sup> See Thomas Babington Macaulay, *Sir James Mackintosh* (1835), reprinted in CRITICAL AND HISTORICAL ESSAYS: THOMAS BABINGTON, LORD MACAULAY 163 (Hugh Trevor-Roper ed., 1965) ("As we would have our descendants judge us, so ought we to judge our fathers.").

the law.<sup>129</sup> A similar danger lurks in the temporal context. In every generation there are ruling and ruled classes, and the distribution of these groups across race, gender, and time in the American experience has not been random. The privileged and powerful of today are, on balance, a good deal likelier to be the progeny of yesterday's elites than of yesterday's oppressed. This is, in fact, precisely what makes the task of judging the actions of earlier American generations' leaders so difficult. Even though we are not related to them by blood, they are nonetheless in some sense *our* ancestors by virtue of the leadership positions they occupied, and our judgment is compromised by the allegiance we feel we owe them. But when we too quickly excuse them for their impositions on the powerless of their day, we deprive the powerless of today, and their advocates, of the important example of their experience. We undermine the deterrent effect of history, and in so doing, create conditions that are more conducive to renewed victimization. The criminal law's cultural defense thus reminds us that suspending judgment of the wrongdoing of prior generations is not harmless generosity to the departed. It carries a cost, and that cost likely will be born by the powerless.

## V. THE MENS REA OF HISTORICAL ACTORS

The preceding section might lead a reader to think that the literature on the criminal law's cultural defense has reached consensus on the relevance and admissibility of cultural evidence. This is not so. Although the more recent literature does not swing wildly from arguments for wholesale exculpation to arguments for categorical inadmissibility as it did twenty years ago, scholars now pursue a narrower set of disagreements about the precise role that cultural evidence might permissibly play at trial and in sentencing.<sup>130</sup> Those disagreements, however, all work from the shared premise that the central legitimate reason to admit evidence of culture is to shed light on the mental

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<sup>129</sup> See Coleman, *supra* note 97, at 1136-44; Kim, *supra* note 9, at 111-12; Rimonte, *supra* note 115, at 1326; Sacks, *supra* note 97, at 541-42; Fischer, *supra* note 97, at 690-91; Sikora, *supra* note 15, at 1709-11.

<sup>130</sup> Compare Kim, *supra* note 9, at 133-38 (proposing a framework for judges to determine whether to admit cultural evidence at criminal trials), with Neff, *supra* note 97, at 468-75 (advocating use of cultural evidence as a mitigating factor during sentencing), and Sikora, *supra* note 15, at 1714-24 (arguing judges only should take cultural evidence into account in the sentencing phase of a criminal trial).

state of the accused.<sup>131</sup> This focus on the mental state of the actor from a different culture will help us to develop a better understanding of what we mean when we speak of the culpability of an actor from an earlier day.

In a recent article, Kay Levine presents a compelling explanation for the focus on mental state in the debate over the cultural defense.<sup>132</sup> She explains that the cultural defense raises a fundamental question about the relationship between culture and action.<sup>133</sup> At one extreme, "soft" or "external" theorists of that relationship contend that people choose their actions freely, without cultural influence, and use culture merely to explain or justify what they have done.<sup>134</sup> At the other end of the continuum, "hard" or "internal" theorists maintain that culture "program[s]" actors to behave as they do, "eliminating their sense of agency or responsibility for their actions."<sup>135</sup> An intermediate position suggests a sort of feedback loop between an actor and culture: an actor initially chooses his actions, but upon recognizing that certain actions fit within a larger cultural schema, he internalizes or appropriates that schema.<sup>136</sup> The schema assumes an ever-more-powerful role in determining the actor's conduct, and earlier individual motivations recede. It becomes intuitive, natural, and ultimately coercive.<sup>137</sup>

Levine argues that the cultural defense brings a claim of cultural coercion into conflict with the baseline assumption of American criminal law that people freely choose their actions and are individually responsible for everything they do.<sup>138</sup> At the practical level, this conflict between culture and autonomy plays itself out in disputes about a criminal defendant's mental state.<sup>139</sup> Inquiry into the *mens rea*—the actor's allegedly culpable state of mind—is the logical place for a finder of fact to determine the extent to which larger forces out-

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<sup>131</sup> See Maguigan, *supra* note 15, at 87–88; Sacks, *supra* note 97, at 547–50; Wu, *supra* note 97, at 1020–22.

<sup>132</sup> See generally Levine, *supra* note 121.

<sup>133</sup> See *id.* at 42–43.

<sup>134</sup> *Id.* at 43.

<sup>135</sup> *Id.* at 44.

<sup>136</sup> *Id.* at 45–46.

<sup>137</sup> See Levine, *supra* note 121, at 46. This intermediate position, which Levine seems to favor, comes from the work of the feminist anthropologist Sherry B. Ortner. See Sherry B. Ortner, *Patterns of History: Cultural Schemas in the Founding of Sherpa Religious Institutions*, in *CULTURE THROUGH TIME: ANTHROPOLOGICAL APPROACHES* 57, 57–93 (Emiko Ohnuki-Tierney ed., 1990).

<sup>138</sup> See Levine, *supra* note 121, at 46.

<sup>139</sup> *Id.* at 47.

side the defendant's own will and awareness shaped or dictated the harmful act.<sup>140</sup> Levine concludes that evidence of culture ought to be admissible where it undermines the defendant's criminal intent by "provid[ing] a . . . noncriminal explanation for the defendant's actions or where cultural demands place the defendant under extraordinary stress and rob him of meaningful agency."<sup>141</sup> Levine contends that no free-standing cultural defense to criminal liability is necessary for this purpose because our well-established criminal law *mens rea* defenses are adequate to the task.<sup>142</sup> On the other hand, Levine argues that cultural evidence should not be admissible where it does nothing to disprove the defendant's intent to harm the victim, but instead merely reveals that the defendant's culture tends to tolerate such harm more readily than does American culture.<sup>143</sup>

Whereas Levine opposes a free-standing cultural defense to criminal liability, Alison Dundes Renteln supports it.<sup>144</sup> In Renteln's view, an independent, free-standing culture-based defense is necessary to overcome the extreme reluctance of most judges to admit evidence of cultural context in support of an existing criminal law defense.<sup>145</sup> In her recent book, *The Cultural Defense*, Renteln notes that a person's cultural context often supplies that person's *motive* for engaging in an act that harms another, even if it does not negate the person's *intent* to do harm. That culturally-based motive, she contends, is at least partially exculpatory, even if it does not negate criminal intent and thereby supply a fully exculpatory excuse. What Renteln has in mind is thus a *partial* excuse, a sort of generic lesser-included-offense for all crimes that would be available to a defendant who acted from a culturally-influenced motive.<sup>146</sup>

What is notable about the disagreement between Levine, an opponent of a free-standing cultural defense, and Renteln, a supporter, is a hidden point of agreement. Both believe that to the extent that culture mitigates or cancels criminal liability, it does so because culture can undermine the culpability of a mental state. Renteln writes clearly that "the rationale behind [a free-standing cultural defense]

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<sup>140</sup> See *id.*

<sup>141</sup> See *id.* at 80.

<sup>142</sup> See *id.* at 77 n.60. This is also a major thrust of Holly Maguigan's work. See Maguigan, *supra* note 15, at 87-90.

<sup>143</sup> See Levine, *supra* note 121, at 75.

<sup>144</sup> See RENTELN, *supra* note 14, at 200-01.

<sup>145</sup> See *id.* at 189-201.

<sup>146</sup> See *id.* at 191-92.

... is that an individual's behavior is influenced to such a large extent by his culture that either (1) the individual simply did not believe that his actions contravened any laws, or (2) the individual felt compelled to act the way he did."<sup>147</sup> Renteln wishes to be certain that the criminal law appropriately mitigates the liability of persons whose "cultural conditioning predispose[d] [them] to act in certain ways,"<sup>148</sup> and who therefore acted with a "beneficent motive."<sup>149</sup>

Levine makes more or less the same point in her work, but with different words: the defendants entitled to mitigation are those whose "cultural demands place [them] under extraordinary stress and rob [them] of meaningful agency."<sup>150</sup> As with Renteln, Levine's focus is on cultural *compulsion*. She notes that a successful defense based on culture in a criminal case requires proof both that the defendant honestly acted for the claimed cultural reason at the time of the harmful act and that the defendant's "reliance on culture (rather than on American legal standards) was reasonable."<sup>151</sup> The inquiry into reasonableness focuses on "the actor's (in)ability or (un)willingness to disregard cultural prescriptions—to resist cultural schemas—in response to the victim's behavior or mainstream social pressures."<sup>152</sup> Cultural schemas are not, after all, invariably and irreversibly coercive: "A cultural frame that has been taken into the self can be taken out again—when others fail to react in expected ways, for example, or when circumstances change, or simply when a person matures."<sup>153</sup> Thus, Levine argues, the reasonableness of a defendant's reliance on culture will turn on the degree of its *choseness*. If the fact finder "believes that the defendant was able to operate outside of the schema but simply chose not to do so, it will likely find her reliance on culture unreasonable."<sup>154</sup>

If scholars agree that harmful acts are excusable to the extent that a defendant's cultural framework compelled her to act as she did, then perhaps something similar might be true for the cultural defense's temporal cousin. The analogy is admittedly not easy to draw because historians, unlike lawyers, do not have doctrines (or even

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<sup>147</sup> *Id.* at 187.

<sup>148</sup> *Id.* at 13.

<sup>149</sup> RENTELN, *supra* note 14, at 201.

<sup>150</sup> Levine, *supra* note 121, at 80.

<sup>151</sup> *See id.* at 48.

<sup>152</sup> *Id.*

<sup>153</sup> *See id.* (quoting Ortner, *supra* note 137, at 89).

<sup>154</sup> Levine, *supra* note 121, at 48.

really much of a vocabulary) of culpability. Historians are simply not accustomed to examining the mens rea of historical actors.<sup>155</sup> But the literature of the cultural defense suggests fairly clearly that *compulsion and choice* are important factors in assessing the culpability of the actions of past generations. To what extent, we should ask, did the political and social climate, the moral norms, and the behavioral expectations of the actor's day compel her to do what she did? To what extent was it possible for the person to act differently and more consistently with what would emerge as the standards of a later age? To what extent can we look back on the actor's behavior and see it as a *choice* of consequence, an act of independent moral agency?<sup>156</sup>

A number of factors will inform this inquiry into the historical figure's agency. At a basic level, we must ask whether the circumstances of the actor's time allowed any access at all to standards different from his own. Consider, for example, a hypothetical Virginia planter in the year 1690 who made a decision to switch his crop from wheat to tobacco. A modern anti-smoking activist, who knows that tobacco is an addictive agent of illness and death for millions of smokers, might condemn this decision. But that activist surely cannot condemn the planter's decision in its own historical moment. Tobacco's lethal properties were not known in the late seventeenth century—"the relationship of tobacco to health lay deep in the shadow of ignorance."<sup>157</sup> Attacks on smoking before the mid-nineteenth century "were couched largely in moral, xenophobic, and economic terms,"<sup>158</sup> not in terms of health. Indeed, seventeenth-century Englishmen saw smoking as a defense against the plague.<sup>159</sup> Even as late as the 1850s, the leading English-language medical journal opined that smoking

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<sup>155</sup> See BURNARD, *supra* note 88, at 31.

<sup>156</sup> Historian Gordon A. Craig beautifully expressed this point about the choices confronting historical figures in his essay entitled *History as a Humanistic Discipline*.

To forget that the present is the result of many developments that might have taken a different course and of decisions that might not have been made, or not at the same time or in the same way, is seriously to foreshorten our historical perspective and to indulge in linear thinking of the most restricted kind. The duty of the historian . . . is to restore to the past the options it once had.

Gordon A. Craig, *History as a Humanistic Discipline*, in HISTORICAL LITERACY 134 (Paul Gagnon ed., 1989).

<sup>157</sup> RICHARD KLUGER, *ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS* 15 (1996).

<sup>158</sup> *Id.* at 14–15.

<sup>159</sup> *Id.* at 15.

could "be indulged in with moderation, without manifest injurious effect on the health for the time being."<sup>160</sup> Just as the law might be willing to entertain a claim in mitigation on behalf of a rainforest tribesman suddenly plopped down in the middle of early-twenty-first-century America, on the basis that the tribesman lacked any meaningful access to a tradition other than his own, so should we be open to such a claim on behalf of a temporally-remote ancestor.

Now contrast this Virginia planter's farming decision with the decision of his hypothetical great-great-grandson to purchase slaves in 1840. A plea to suspend judgment of the nineteenth-century slaveholding planter in deference to his historical moment is surely weaker than the plea on behalf of his tobacco-harvesting forebear. Whereas the late-seventeenth-century planter lived in a time of ignorant consensus on questions of tobacco and health, the nineteenth-century slave owner lived in a time of intense debate on the propriety of owning other human beings. Change was afoot, and had been for some time.<sup>161</sup> The American and French revolutions of the late eighteenth century had upended the earlier understanding of the world as a divinely ordained hierarchy that assigned everyone—masters and slaves alike—fixed positions of social and political control.<sup>162</sup> Writing in 1782, no less a figure than Thomas Jefferson had noted that "the whole commerce between master and slave is . . . the most unremitting despotism on the one part, and degrading submissions on the other."<sup>163</sup> By 1807, the slave trade had been abolished in England,<sup>164</sup> and a slave revolt had won independence for what would become the Republic of Haiti.<sup>165</sup> In the decades that followed, an abolition movement took root and flourished in the United States even while Southern jurisdictions passed laws designed to protect the institution of slavery and to make voluntary emancipation more difficult.<sup>166</sup> Slavery

<sup>160</sup> *Id.* at 16.

<sup>161</sup> See BURNARD, *supra* note 88, at 104–06.

<sup>162</sup> See ISAAC, *supra* note 1, at 46–47, 105, 180–83.

<sup>163</sup> D.B. Davis, Inaugural Lecture Delivered Before the University of Oxford: Was Thomas Jefferson an Authentic Enemy of Slavery? (Feb. 18, 1970), in WAS THOMAS JEFFERSON AN AUTHENTIC ENEMY OF SLAVERY? 6, 6 (1970) (quoting THOMAS JEFFERSON, COMMERCE BETWEEN MASTER AND SLAVE (1782)).

<sup>164</sup> See JAMES WALVIN, BLACK IVORY: SLAVERY IN THE BRITISH EMPIRE 262 (Blackwell Publishers Ltd. 2d ed. 2001) (1992).

<sup>165</sup> See GEORGE F. TYSON, JR., TOUSSAINT L'OUVERTURE 25 (1973).

<sup>166</sup> See DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823, at 197–98 (1975); MERTON L. DILLON, SLAVERY ATTACKED: SOUTHERN SLAVES AND THEIR ALLIES 1619–1865, at 148 (1990); ROBERT MCCOLLEY, SLAVERY AND JEFFERSONIAN VIRGINIA 2–4 (1964).



itself (and not merely the slave trade) was abolished throughout the British Empire in 1834.<sup>167</sup> Slave acquisition and ownership in the 1840s were inevitably acts of conscious moral choice in a way that they had not been in an earlier time. Thus, just as a fact finder would be interested in knowing whether a recent Hmong immigrant came to the United States from a place of genuinely monolithic culture (his remote home village in the Laotian mountains) or from a place of broad and mixed influences (years of interim residence in an Asian metropolis), we should be interested in knowing whether our ancestor lived in a time of stasis on the practice in question or in a time of flux.

Also relevant to what I am calling the *chosenness* of past wrongdoing is the position of the questioned practice in the cultural spectrum of its day. We know, for example, that eighteenth-century Jamaican slavery was a brutal institution<sup>168</sup>—more so than the contemporaneous slavery of the southeastern United States.<sup>169</sup> Yet even within that violent framework, we can identify sadistic sociopaths. Jamaican slave owner Thomas Thistlewood did not confine himself to the flogging and sexual harassment that were then common methods of slave control. He devised a punishment he called “Derby’s Dose,” in which he whipped a misbehaving slave, rubbed “salt pickle, lime juice and bird pepper” in the open wounds, forced another slave to defecate in his mouth, and then gagged him for four or five hours.<sup>170</sup> Thistlewood also forced slaves to urinate into the eyes and mouths of others, and sometimes rubbed slaves with molasses and left them naked outside overnight to be devoured by mosquitoes.<sup>171</sup> Just as the law would insist on knowing whether a particular immigrant’s violent behavior is truly an artifact of his culture or a deviant choice of his own, we should ask the same question about the harms that our ancestors inflicted. “Derby’s Dose” was an outrage even in its time, and we should not allow arguments about hindsight and historical context to dull our appreciation of that.

Just as the position of the wrongdoing in the spectrum of an era’s conduct is an important facet of the *chosenness* of past wrongdoing, so is the position of the *wrongdoer*. Not every member of a generation shares equally in the maintenance of its social and cultural practices. Those who seek or inherit positions of influence and prominence

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<sup>167</sup> See WALVIN, *supra* note 164, at 264.

<sup>168</sup> See BURNARD, *supra* note 88, at 32–33, 150, 177–79.

<sup>169</sup> See *id.* at 149–50.

<sup>170</sup> See *id.* at 104.

<sup>171</sup> See *id.*

bear special responsibility for those practices because they set an example for others and are in a position to effect change. In this sense, Thomas Thistlewood contrasts usefully with his contemporary, Landon Carter. Both men were slave owners—Thistlewood in Jamaica<sup>172</sup> and Carter in Virginia.<sup>173</sup> Thistlewood was notably more brutal with his slaves than was Carter, but was also a “nobody” in the society of his day—unknown outside his small Jamaican parish, and even there only for his beautiful garden.<sup>174</sup> His influence—terrorizing as it was—spread no further than the boundaries of his 160-acre farm.<sup>175</sup>

Carter, by contrast, was an heir to one of Virginia’s great families—the son of Robert “King” Carter, who owned more than 300,000 acres and more than 700 slaves and was, in the words of Rhys Isaac, “a grandee among the grandees.”<sup>176</sup> Landon himself, even after sharing his father’s estate with siblings, was one of Virginia’s twelve richest men and the owner of more than 400 slaves.<sup>177</sup> He was also a member of Virginia’s House of Burgesses,<sup>178</sup> the presiding judge of his county court,<sup>179</sup> the chair in 1774 of his county’s committee to boycott British goods,<sup>180</sup> a friend of the powerful Lee family,<sup>181</sup> and, although not a trained physician, a respected medical practitioner.<sup>182</sup> He was, in short, a man of influence in his county and his colony’s social and political life.

Some such men chose to free some or all of their slaves. Landon Carter’s nephew, Robert Carter III, an even wealthier man than his uncle, began emancipating his 452 slaves in 1791, not much more than a decade after his uncle’s death, and continued the process through the rest of his life.<sup>183</sup> Fellow Virginian George Wythe<sup>184</sup> and

<sup>172</sup> See *id.* at 7.

<sup>173</sup> ISAAC, *supra* note 1, at xvii.

<sup>174</sup> See BURNARD, *supra* note 88, at 9.

<sup>175</sup> See *id.* at 9–10.

<sup>176</sup> ISAAC, *supra* note 1, at xvii.

<sup>177</sup> *Id.* at 60.

<sup>178</sup> *Id.* at 123–61.

<sup>179</sup> *Id.* at 241.

<sup>180</sup> *Id.* at xviii–xix.

<sup>181</sup> See ISAAC, *supra* note 1, at 237, 350 n.40.

<sup>182</sup> See *id.* at 105–20.

<sup>183</sup> See ANDREW LEVY, *THE FIRST EMANCIPATOR: THE FORGOTTEN STORY OF ROBERT CARTER, THE FOUNDING FATHER WHO FREED HIS SLAVES*, at xi (2005). Although wealthier than his uncle Landon, Robert Carter III was less politically influential. See *id.* at xi–xii.

<sup>184</sup> See Philip D. Morgan, *Interracial Sex in the Chesapeake and the British Atlantic World*, in SALLY HEMINGS & THOMAS JEFFERSON: HISTORY, MEMORY, AND CIVIC CULTURE 52, 58–59 (Jan Ellen Lewis & Peter S. Onuf eds., 1999).

Pennsylvanian John Dickinson<sup>185</sup> made similar, if less sweeping, decisions for emancipation. Other men, such as Virginian George Washington,<sup>186</sup> held on to their slaves during their own lifetimes but emancipated them at death.

By contrast, Landon Carter—like fellow Virginians Thomas Jefferson<sup>187</sup> and George Mason<sup>188</sup>—emancipated no one either during his life or upon his death. Indeed, unlike Jefferson and Mason, he never spoke publicly against slavery or even registered hesitations about the institution in his private diary. Landon Carter had a greater opportunity than most men of his day to exert influence on his society's continued endorsement of the ownership of human beings. With that opportunity came responsibility. It is entirely appropriate for us to weigh his failure to shoulder that responsibility as we assess his participation in the slaveholding culture of his time.

To some, it might seem viscerally unfair to condemn centuries-old acts that were not unambiguously immoral in their own time but have become so in ours. The question that this Article explores, however, is whether such a declaration of historical injustice is any *more* unfair than the decision our legal system makes to condemn a recent immigrant from a foreign culture for an act that is not unambiguously immoral in his own society but is in ours. There is no powerful reason to think that it is.

Indeed, judging a historical event may well be *less* unfair than judging an immigrant's conduct. A person charged with a crime risks jail time and a monetary fine if convicted. His cultural defense is thus grounded in due process concerns; he claims that he should not have to surrender liberty and property for conduct that was not actually culpable. In other words, the consequences of conviction are severe enough to the defendant that he is in some sense *owed* consideration of his individuating cultural circumstances. By contrast, when we reflect on the conduct of a person from the past, nothing we say or do can have any impact on his liberty or property. He is gone. If we judge

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<sup>185</sup> See State of Delaware, *John Dickinson: The Slave Holder*, <http://history.delaware.gov/museums/jdp/jdpslave.pdf> (last visited Aug. 24, 2006).

<sup>186</sup> See Mount Vernon Estate and Gardens, *George Washington and Slavery*, [http://www.mountvernon.org/learn/meet\\_george/index.cfm/ss/101](http://www.mountvernon.org/learn/meet_george/index.cfm/ss/101) (last visited Aug. 24, 2006).

<sup>187</sup> See JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 144–52 (1996).

<sup>188</sup> See Mason Mystery, <http://mason.gmu.edu/~rmellen/masonmystery.htm> (last visited Aug. 24, 2006) (stating that Mason “was one of the first Americans and one of the very first southern plantation owners to denounce slavery, yet he owned slaves until the day he died”).

his conduct by the standards of his time rather than ours, we do so not because we actually owe him anything or because he might suffer the physical, emotional, or financial consequences of our judgment. Perhaps we feel that we owe *his memory* a certain sort of consideration. But surely living people who risk hard time in jail have a greater claim to careful and contextually sensitive judgment than do people who have passed on.

It bears emphasis that this Article does not contend that prior generations are unentitled to contextually-sensitive judgment. Indeed, even as to actors from prior generations who can be said to have chosen to act in accordance with the wisdom of their times, rather than embrace a mainstream challenge to it, this Article does not argue against contextually-sensitive judgment. The Article maintains simply that those historical actors do not deserve to be wholly excused for the choices they made. It will usually turn out, however, that they do not deserve to be wholly condemned either.

Again, the criminal law helpfully models the point. Where evidence of cultural influence on behavior does not substantiate a traditional defense to criminal liability such as duress or necessity, that evidence is not simply eliminated from consideration. Rather, it reappears at the defendant's sentencing hearing, where the defendant's lawyer offers it anew to place the defendant's behavior in context and show how it is less culpable than similar behavior by a person from the dominant culture.<sup>189</sup> The purpose of a sentencing hearing is to develop as complete an account as possible of the offender, her background, and the circumstances of her offense, so that the judge may tailor the offender's punishment to her culpability.<sup>190</sup> The inquiry is "broad in scope, largely unlimited either as to the kind of information [the sentencer] may consider, or the source from which it may come."<sup>191</sup> Thus, the defendant who fails in his effort at outright acquittal on grounds of culture nonetheless has the opportunity to argue for a lesser sentence on the same grounds. Moreover, such an opportunity should often succeed because a person who harms another in a way common to his foreign culture is, in fact, less culpable

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<sup>189</sup> See Maguigan, *supra* note 15, at 62–69 (discussing the use of cultural background information in plea bargaining and sentencing proceedings); Neft, *supra* note 97, at 445 (advocating consideration of cultural background information in sentencing). See generally Sikora, *supra* note 15 (arguing a defendant's cultural circumstances should be allowed to serve as a mitigating factor in sentencing).

<sup>190</sup> See *United States v. Lynch*, 934 F.2d 1226, 1235 (11th Cir. 1991).

<sup>191</sup> *United States v. Tucker*, 404 U.S. 443, 446 (1972).

than an otherwise similarly-situated American who causes the same harm with no cultural support.

Something quite similar obtains when we consider the case of a historical actor who chose to embrace rather than challenge the harmful mores of his day. Even if we decide that a monolithic morality in his era did not completely prevent him from choosing different actions, we still owe him careful consideration of the circumstances of his time. We must ask how much debate on the moral question his society actually knew, and whether he had access to it. We must ask what costs the historical actor would have faced for making a different choice, and whether he was able to shoulder such a burden. The answers to these questions will, and should, temper our judgment of the choice he made. But they should not direct us to suspend our judgment entirely. Such considerations should not lead to the whitewashing position of the partisan revisionist who dismisses every claimed injustice as a mere product of its time.

A final example will illustrate the point. Consider a hypothetical Virginia planter who purchased slaves in 1690. We already have seen that slave acquisition in the mid-nineteenth century was an inevitably contestable choice.<sup>192</sup> This was markedly less true in 1690.<sup>193</sup> A religious condemnation of slavery was certainly emerging. It was, however, new; only in 1688 did an American religious movement publicly articulate a case against slavery.<sup>194</sup> And that movement was the Quakers—one centered in the mid-Atlantic colonies, with which our hypothetical Virginia planter would have been, at best, barely familiar. Other anti-slavery voices, most notably that of British slavery abolitionist Thomas Tryon, were also starting to be heard late in the seventeenth century,<sup>195</sup> but they were relatively few and had not yet begun

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<sup>192</sup> See *supra* notes 161–67 and accompanying text.

<sup>193</sup> In the late-seventeenth century, the practice of slavery in the American colonies was still in the process of formation. See DWIGHT LOWELL DUMOND, *ANTISLAVERY: THE CRUSADE FOR FREEDOM IN AMERICA* 5–12 (1961) (discussing the evolving legal status of the institution of slavery in American colonies during the late-seventeenth to early-eighteenth centuries). Although Philippe Rosenberg argues powerfully that “the development of anti-slavery opinion in Britain was coextensive with the institutionalization of slavery itself,” Philippe Rosenberg, *Thomas Tryon and the Seventeenth-Century Dimensions of Antislavery*, 61 WM. & MARY Q. 3d 609, 640 (2004), it is nonetheless clear that late-seventeenth-century antislavery sentiment was neither broad-based nor loud.

<sup>194</sup> In 1688, a group of Pennsylvania Quakers issued the Germantown Petition, which maintained that slavery was inconsistent with Christian principles. See DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 308 & n.25 (1966); THOMAS E. DRAKE, *QUAKERS AND SLAVERY IN AMERICA* 11–14 (1950).

to draw significant attention in the colonies. The development of an organized abolitionist movement in the colonies was still many decades off.<sup>196</sup> Slave ownership in the Virginia of the 1690s therefore stood in a different position from the slave ownership that followed 150 years later. In assessing the wrongfulness of a planter's slave ownership in 1690s Virginia, we must temper our judgment to take account of that different position.<sup>197</sup>

## VI. FIXING THE HOLE: A RETURN TO THE EXAMPLE OF THE JAPANESE AMERICAN INTERNMENT

To begin filling the hole in reparations theory torn open by partisan historical revisionists, this Article has suggested an analogy between temporal and cultural excuse as a provocative and helpful starting place for a theory of historic injustice. The Article cited recent revisionist justifications of the Japanese American internment during World War II as the leading example of the revisionist threat.<sup>198</sup> It will be helpful now to return to that example, to see how the lessons of the analogy to the criminal law's cultural defense help bolster the

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<sup>195</sup> See Rosenberg, *supra* note 193, at 612. But see BURNARD, *supra* note 88, at 105–06 (“Until 1750, antislavery sentiment was close to nonexistent.”).

<sup>196</sup> See DILLON, *supra* note 166, at 87–111 (discussing growing abolitionist sentiment in early-nineteenth-century United States).

<sup>197</sup> A difficult, perhaps intractable, problem remains. Must we say that slavery in a historical era in which slave owners had *no access whatsoever* to an antislavery discourse was not wrong in its time? Or has the entire human drama been played before a “natural law” backdrop that would condemn some practices as wrong regardless of the context in which they occurred?

This question is beyond this Article's scope. Two observations are, however, in order. First, it is probably inaccurate to claim there has ever been a slave owner at any time in history who had truly *no access whatsoever* to an antislavery discourse. Surely, there was always such a discourse among his slaves—a discourse from which the slave owner no doubt insulated himself.

Second, a very careful inquiry into the true diversity of opinion and argument in a given historical period is essential before resorting to natural law. It is tempting to view an era's prevalent discourse as more monolithic than it actually was. Trevor Burnard, for example, asserts that “until 1750, antislavery sentiment was close to nonexistent.” BURNARD, *supra* note 88, at 105–06. Yet Philippe Rosenberg, a scholar whose work focuses on the precise issue of pre-1750 antislavery discourse, asserts otherwise and identifies a significant number of published critiques of slavery in the British world in the late-seventeenth and early-eighteenth centuries. See Rosenberg, *supra* note 193, at 626, 640. If Rosenberg is correct, and there never really was a period of institutionalized slavery in the British Atlantic without antislavery argument or agitation, then it may not be necessary to resort entirely to natural law to assess the wrongfulness of late-seventeenth-century slaveholding in its time.

<sup>198</sup> See *supra* notes 70–85 and accompanying text.

conclusion that the Roosevelt Administration's policies were an injustice even in their own time.

The plea on behalf of those who designed and approved the program of Japanese American exclusion and detention is that, in the context of the vicious Japanese surprise attack on Pearl Harbor and the military threat that Japanese forces posed to the United States mainland in the following months, the mass prophylactic detention of all people of Japanese ancestry along the West Coast was necessary and understandable. The argument is that the American people were justifiably shocked and frightened by Pearl Harbor and believed this preventive measure was needed. As Alan Simpson stated on the floor of the U.S. Senate during debate on what would become the Civil Liberties Act of 1988, "at that time, in most every structure of our citizenry, our Government and our bureaucracy, it seemed the very right thing to do."<sup>199</sup> If this observation is accurate, then it would be very difficult to fault the architects of the government's program for setting up a structure that was universally considered wise. To fault them, it seems, would just be, as Michelle Malkin argues, an unfair condemnation of "serious men . . . who did not have the luxury of a rearview mirror."<sup>200</sup>

The trouble with this view is that the historical record does not support a story of monolithic support and approval of the government's program. Not every American believed in the military necessity of evicting and jailing the West Coast's Japanese American population. Indeed, very powerful and articulate people in the American mainstream opposed the program. And Franklin Roosevelt, who gave the order approving the War Department's eviction and detention of Japanese Americans, had easy access to these substantial opposing views.

When Roosevelt signed Executive Order 9066, he knew that the top officials in his Justice Department had vigorously opposed it.<sup>201</sup> In debates with War Department officials, James Rowe and Edward Ennis, two top deputies to Attorney General Francis Biddle, argued that the forcible relocation of American citizens of Japanese ancestry (as opposed to Japanese aliens) would be illegal.<sup>202</sup> Rowe,<sup>203</sup> En-

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<sup>199</sup> 134 CONG. REC. 4386, 4392 (1988) (statement of Sen. Simpson), available at <http://bss.sfsu.edu/internment/Congressional%20Records/19880420b.html#simpson>.

<sup>200</sup> MALKIN, *supra* note 6, at xxxiv.

<sup>201</sup> Peter Irons's book *JUSTICE AT WAR* is the most detailed account of the inter-departmental wrangling that preceded Roosevelt's decision to approve of the War Department's proposal to evict Japanese Americans from the West Coast. See IRONS, *supra* note 55, at 25-74.

<sup>202</sup> See *id.* at 55, 62.

<sup>203</sup> See *id.* at 44.

nis,<sup>204</sup> Biddle,<sup>205</sup> and Federal Bureau of Investigation ("FBI") Director J. Edgar Hoover<sup>206</sup> all maintained that a program of mass removal and relocation was entirely unnecessary. Biddle made this position clear to Roosevelt in a meeting on February 7, 1942, just four days before Roosevelt orally approved the War Department's plan.<sup>207</sup> In short, it is simply not true that eviction and incarceration seemed "the right thing to do" to everyone who had lived through the trauma of Pearl Harbor. It seemed the wrong thing to Roosevelt's own Attorney General and to the Director of the FBI.

It also seemed the wrong thing to the two men who had preceded Francis Biddle in the Attorney General's Office in the Roosevelt Administration—Frank Murphy (1939–1940) and Robert H. Jackson (1940–1941)—both of whom had become Associate Justices of the U.S. Supreme Court by the time of the Pearl Harbor attack. Reluctantly concurring in the Court's 1943 decision upholding the constitutionality of a dusk-to-dawn curfew imposed on Japanese Americans, Justice Murphy described the race-based curfew as bearing "a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe."<sup>208</sup> The curfew, Murphy said, went "to the very brink of constitutional power."<sup>209</sup>

A year later, Justice Murphy dissented from the Court's 6–3 decision upholding the Administration's program evicting Japanese Americans from their homes and indefinitely excluding them from the West Coast.<sup>210</sup> Murphy's condemnation of the program was stark. Citing his words of a year earlier, Murphy charged that the Administration's program went "over 'the very brink of constitutional power' . . . into the ugly abyss of racism."<sup>211</sup> It stemmed from "an erroneous assumption of racial guilt rather than bona fide military necessity,"<sup>212</sup> and the justifications offered by the government were nothing but "an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices."<sup>213</sup> Justice Murphy called

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<sup>204</sup> *See id.*

<sup>205</sup> *See id.* at 53.

<sup>206</sup> *See* IRONS, *supra* note 55, at 27–29.

<sup>207</sup> *See id.* at 53.

<sup>208</sup> *Hirabayashi v. United States*, 320 U.S. 81, 111 (1943) (Murphy, J., concurring).

<sup>209</sup> *Id.*

<sup>210</sup> *Korematsu v. United States*, 323 U.S. 214, 233–42 (1944) (Murphy, J., dissenting).

<sup>211</sup> *Id.* at 233.

<sup>212</sup> *Id.* at 235–36.

<sup>213</sup> *Id.* at 239.



the Administration's program a "legalization of racism, . . . unattractive in any setting but . . . utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States."<sup>214</sup>

Justice Jackson, not just a former U.S. Attorney General but also a close friend and confidante of President Roosevelt,<sup>215</sup> also condemned the eviction and exclusion of Japanese Americans on the basis of the military's flimsy claim of necessity. In *Korematsu v. United States* in 1944, Jackson emphasized that the only thing that made Fred Korematsu's continued presence in California a crime was the ancestry he inherited from his parents.<sup>216</sup> His conviction for violating the military's exclusion order therefore violated the "fundamental assumption underl[yin]g our system . . . that guilt is personal and not inheritable."<sup>217</sup> To "approve [what] the military . . . deem[ed] expedient," said Justice Jackson, the Court had to "distort the Constitution"<sup>218</sup> and to "validate the principle of racial discrimination in criminal procedure and of transplanting American citizens."<sup>219</sup>

Neither is it the case that the American people as a whole believed in the military necessity of incarcerating the West Coast's entire Japanese American population. Well-respected Americans publicly and articulately opposed the plan. Consider, for example, a letter that a group of prominent American educators, politicians, businesspersons, and artists sent to President Roosevelt on April 30, 1942.<sup>220</sup> Although they said they "recognize[d] fully the difficulties of the situation" involving Japanese Americans on the West Coast, they maintained that they had seen "no adequate evidence . . . that an order giving complete power to the Secretary of War or to the commander of each military area to exclude from designated areas all citizens, or to restrict

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<sup>214</sup> *Id.* at 242.

<sup>215</sup> See generally ROBERT H. JACKSON, *THAT MAN* (2003).

<sup>216</sup> *Korematsu*, 323 U.S. at 243 (Jackson, J., dissenting).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 244–45.

<sup>219</sup> *Id.* at 246. Justice Roberts also dissented in the *Korematsu* case, condemning the program of eviction and exclusion as a clear violation of constitutional rights. See *id.* at 225–26 (Roberts, J., dissenting) (stating that the case was one of "punishment [of an individual] for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States").

<sup>220</sup> Letter from Alfred M. Bingham et al. to Franklin D. Roosevelt (Apr. 30, 1942), reprinted in Posting of Eric Muller to IsThatLegal?, *The Hindsight Theory of the Japanese American Internment Takes (Yet) Another Hit*, [http://www.isthatlegal.org/archives/2006/05/the\\_hindsight\\_t.html](http://www.isthatlegal.org/archives/2006/05/the_hindsight_t.html) (May 23, 2006, 12:44 EST).

their actions in any way he sees fit, is either constitutional or democratic." Singling out "the Japanese alone" for these burdens, they argued, "approximates the totalitarian theory of justice practiced by the Nazis in their treatment of the Jews."<sup>221</sup> Signatories to this blunt and contemporaneous condemnation of the government's evacuation policy included Alfred M. Bingham, the editor of the progressive journal *Common Sense*, George S. Counts, the well-known sociologist and educational reformer; Countee Cullen, the African-American poet; John Dewey, the founder of Pragmatist philosophy and educational reformer; Sherwood Eddy, the national secretary of the YMCA; clergyman Harry Emerson Fosdick; University of North Carolina President Frank Porter Graham; prominent Unitarians Mary W. Hillyer and John Haynes Holmes; James Wood Johnson, the co-founder and ex-president of the Johnson & Johnson Company; Christian intellectual Reinhold Niebuhr; Clarence E. Pickett, the executive secretary of the American Friends Service Committee; pastor and presidential candidate Norman Thomas; Mount Holyoke ex-president Mary E. Woolley; and others.<sup>222</sup> These were no fringe figures in American intellectual and political life, and they made their dissent known to the President at the very moment that the Administration was laying its plans for long-term exclusion and detention.

Consider also an editorial by the highly regarded *Washington Post* editorialist Merlo Pusey entitled "War vs. Civil Rights," published in May of 1944.<sup>223</sup> Pusey maintained that when the war was over, the nation would be "very much ashamed" of the "mistreatment of loyal American citizens of Japanese origin."<sup>224</sup> Pusey pointed out that the nation had seen "no sabotage by a Japanese American in this war," and that "[a]n overwhelming majority of those who were ousted from the Western States have never committed a crime of any sort and have always remained loyal to the United States."<sup>225</sup> Pusey demanded to know why "the Administration . . . continues to punish loyal citizens solely because of their racial origin."<sup>226</sup> Predicting that the courts would "compel the Administration to retreat from what many of its own officials recognize to be an indefensible position," the columnist called the exclusion and internment policies "black patches on an

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<sup>221</sup> *Id.*

<sup>222</sup> *See id.*

<sup>223</sup> Merlo Pusey, Editorial, *War vs. Civil Rights*, WASH. POST, May 9, 1944, at 9.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

otherwise very creditable record in the protection of civil rights."<sup>227</sup> These are not the words of the lunatic fringe; they are the words of a well-respected, nationally syndicated political columnist.

Merlo Pusey and the signatories to the April 1942 letter to the President were hardly alone in their criticism of the government's policies. A March 1943 article in *The Reader's Digest* criticized the policies as a costly mistake, noting that the supposedly dangerous Japanese American population had been left more or less untouched in Hawaii, that German Americans and Italian Americans on the East Coast posed similar supposed dangers but also went untouched, and that individualized loyalty inquiries would have been possible for a fraction of the cost.<sup>228</sup> In June of 1942, Charles Iglehart wrote in the pages of *The Nation* that "even as a war measure evacuation was unnecessary."<sup>229</sup> "The slumbering embers of public antagonism to the alien group," he wrote, "were . . . deliberately fanned by interested persons and organizations until a conflagration was threatened, but at any time it could have been quenched if the authorities had shown the proper firmness."<sup>230</sup> Writing in *Commonweal* in October of 1943, Harold J. Filsicker argued that the military situation along the West Coast was "well in hand" before the first evacuation orders were issued, and that any potential danger to the Coast was "practically over" before the process of exclusion was complete.<sup>231</sup> Articles critical of the Japanese American program also appeared in *The New Republic*, *Business Week*, *Christian Century*, *Asia*, *Collier's*, *Time*, *Newsweek*, *Harper's*, *Fortune*, and *The Saturday Evening Post* magazines, among others.<sup>232</sup>

Well-respected figures quite near the centers of American political power and public life vocally opposed the wholesale exclusion and incarceration of American citizens of Japanese ancestry during World War II. These prestigious opposing voices surely reached the ears of the men who designed and implemented the program, as well as of the President who authorized it and allowed it to operate for several years. The program was not remotely foreordained; it was rather their choice. In Kay Levine's words, these were men who were "able to oper-

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<sup>227</sup> *Id.*

<sup>228</sup> See J.P. McEvoy, *Our 110,000 New Boarders*, *READER'S DIGEST*, Mar. 1943, at 65-66.

<sup>229</sup> Charles Iglehart, *Citizens Behind Barbed Wire*, 23 *THE NATION*, June 6, 1942, at 649, 649.

<sup>230</sup> *Id.*

<sup>231</sup> Harold J. Filsicker, *Relocation Camps*, *COMMONWEAL*, Oct. 1, 1943, at 578, 578-80.

<sup>232</sup> Memorandum from Maj. C.K. Cartwright & Capt. Emanuel Aaronson to Civil Affairs Div. (Oct. 2, 1945) (on file with author) (reporting on the survey of magazines and number of articles appearing in each in opposition to the Japanese evacuation project).

ate outside of the schema [of their time] but simply chose not to do so."<sup>233</sup> Their choice was a wrong one that shattered the lives of tens of thousands of innocent Americans. The historical moment in which they lived was not monolithic, and it does not excuse or minimize the injustice of the choices they made.<sup>234</sup> Neither does it undermine the extraordinary apology and redress that former internees and their children and allies managed to secure in the 1980s and 1990s.

### CONCLUSION

In June of 2005, Wachovia, the nation's fourth largest bank, made a stunning announcement. Research had revealed that two of its predecessor corporations had been involved in the market for

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<sup>233</sup> Levine, *supra* note 121, at 48.

<sup>234</sup> Neither, it should go without saying, does their historical moment *justify* the choice they made. In the criminal law, a defense of justification differs from a defense of excuse in an important moral sense. Conduct that is excusable is conduct that is morally wrong but contextually understandable. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 203 (3d ed. 2001). Conduct that is justifiable is conduct that is morally correct—the right thing to do in the circumstances. See Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 7–9 (2003).

The criminal law's cultural defense is a defense of excuse: the defendant's claim is not that he acted rightly, but that his cultural context relieves him of responsibility for the wrong choice he made. See Gordon, *supra* note 97, at 1810. Yet at times, the most enthusiastic defenders of the wrongdoing of prior generations speak the language of justification rather than excuse. When U.S. Representative Howard Coble recently defended the government's wartime treatment of Japanese Americans, he did not contend that the mass incarceration of tens of thousands of American citizens was a contextually understandable judgment. He maintained that it was a *correct* judgment, justified both to protect Japanese Americans from vigilante violence and to protect the United States from those Japanese Americans who meant the country harm. See Associated Press, *N.C. Rep.: Internment Camps Were Meant to Help*, FoxNews.com, Feb. 5, 2003, <http://www.foxnews.com/story/0,2933,77677,00.html>.

This sort of enthusiasm for the wrongdoing of the past is doubly dangerous. Not only does it carry all of the risk of a recurrence of the tragedy that this Article has described, but it also entails a disturbing conclusion about people who resisted the action that caused them harm. The criminal law shows this clearly: a person who resists a justified aggressive act acts culpably, whereas a person who resists an excusable aggressive act does not. See Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. Rev. 61, 61–62 n.2 (1984). A person may lawfully resist an insane person who threatens deadly force, but may not lawfully resist a person who acts in self-defense. See *id.*

The consequence of justifying (as opposed to excusing) the harmful acts of a prior generation is therefore to condemn those who resisted them. See JAMES W. LOEWEN, *LIES ACROSS AMERICA* 28 (1999) ("[I]t is hard for residents of Edgefield to honor Americans who fought *against* the Vietnam War so long as their downtown monument credits those who fought *in* the war for being right."). If the eviction and incarceration of Japanese Americans was a justified program, then Fred Korematsu acted wrongly when he decided not to report for detention as ordered. See *generally Korematsu*, 323 U.S. 214.

slaves in the nineteenth century: The Georgia Railroad and Banking Company had owned 162 slaves between 1836 and 1842,<sup>235</sup> and the Bank of Charleston had accepted 529 slaves as collateral on loans and mortgages between 1841 and 1860.<sup>236</sup> "We are deeply saddened by these findings," Wachovia said. "[We] apologize to all Americans, and especially to African-Americans and people of African descent."<sup>237</sup> As compensation, the bank committed to donate \$11 million to charities emphasizing African-American educational causes.<sup>238</sup> Wachovia was, moreover, not the only American bank to make such an announcement in 2005; JP Morgan Chase,<sup>239</sup> Bank of America,<sup>240</sup> and Lehman Brothers<sup>241</sup> each made similar announcements about predecessor entities and committed to similar compensatory schemes during 2005.<sup>242</sup>

This did not sit well with Jeff Jacoby, a syndicated columnist for the *Boston Globe*. In a column entitled *The Slavery Shakedown*, Jacoby rehearsed the common arguments against reparations for slavery: "Living white Americans bear no culpability for slavery," he argued, "and living black Americans never suffered from it."<sup>243</sup> Jacoby added a new twist, however: not only was Wachovia's trade in slaves too remote to permit reparations, but "[t]he slaves for which [Wachovia] was so apologetic were owned decades before the Civil War, when slavery was

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<sup>235</sup> See Summary of Research on Georgia Railroad and Banking Company, [http://www.wachovia.com/file/Summary\\_of\\_Research\\_Georgia\\_Railroad\\_and\\_Banking\\_Company.pdf](http://www.wachovia.com/file/Summary_of_Research_Georgia_Railroad_and_Banking_Company.pdf) (last visited Aug. 23, 2006).

<sup>236</sup> See Summary of Research on Bank of Charleston, [http://www.wachovia.com/files/Summary\\_of\\_Research\\_Bank\\_of\\_Charleston.pdf](http://www.wachovia.com/files/Summary_of_Research_Bank_of_Charleston.pdf) (last visited Aug. 23, 2006).

<sup>237</sup> Press Release, Wachovia, Wachovia Completes Research of Predecessor Companies (June 1, 2005), available at [http://www.wachovia.com/inside/page/0,,134\\_307%5E1191,00.html](http://www.wachovia.com/inside/page/0,,134_307%5E1191,00.html).

<sup>238</sup> See Binyamin Appelbaum, *Bank Ups Giving to Black Causes*, CHARLOTTE OBSERVER, July 29, 2005, at 1D.

<sup>239</sup> *Id.*

<sup>240</sup> *National Legal and Policy Center Accuses Bank of America of Cowardly Conduct by Apologizing for Alleged Ties to Slavery*, U.S. Newswire, Aug. 25, 2005, <http://releases.usnewswire.com/GetRelease.asp?id=52081>.

<sup>241</sup> Press Release, NLPC, *NLPC Criticizes Lehman Brothers' Slavery Apology* (Sept. 13, 2005), available at <http://www.nlpc.org/view.asp?action=viewArticle&aid=1061>.

<sup>242</sup> All of the corporate soul-searching research was prompted by a Chicago ordinance that requires all banks doing business with the city to disclose their past ties to slavery. See *City of Chicago Reparation Ordinance Gets Support from Mayor Richard M. Daley*, U.S. Conference of Mayors, Oct. 21, 2002, [http://www.usmayors.org/uscm/us\\_mayor\\_newspaper/documents/10\\_21\\_02/chicago.asp](http://www.usmayors.org/uscm/us_mayor_newspaper/documents/10_21_02/chicago.asp).

<sup>243</sup> See Jeff Jacoby, Op-Ed., *The Slavery Shakedown*, BOSTON GLOBE, June 9, 2005, available at [http://www.boston.com/news/globe/editorial\\_opinion/oped/articles/2005/06/09/the\\_slavery\\_shakedown](http://www.boston.com/news/globe/editorial_opinion/oped/articles/2005/06/09/the_slavery_shakedown).

still lawful throughout the South.”<sup>244</sup> That last clause bears repeating: “*when slavery was still lawful throughout the South.*” The mind struggles to grasp the relevance of the fact that slavery remained technically lawful in the South in the two or three decades before the Civil War. Could it be that the syndicated columnist was subtly offering a *substantive* defense of the ownership of slaves?

That is precisely what he was doing. A line or two later in the column, Jacoby summarized his criticism of Wachovia’s slavery apology: it was contrition “for something Wachovia didn’t do, in an era when it didn’t exist, *under laws it didn’t break.*”<sup>245</sup> This is not simply an argument that Wachovia’s predecessors’ wrongs were too remote in time to redress. It is an argument that Wachovia’s predecessors *broke no law*—that is, that there is no wrong to redress.<sup>246</sup> According to Jacoby, the argument for reparations is not just impractical or logically flawed. It makes “a mockery of *historical truth*”<sup>247</sup>—the historical “truth” that these banks’ ownership of human beings between 1836 and 1860 was not an injustice, because it was lawful.<sup>248</sup>

The supposed concern for “historical truth” and the insistence that slave owners be judged under the legal code of their time should look familiar. These are the strategies of partisan historical revisionism—the germ of Michelle Malkin’s justification of racial internment, now spread to American chattel slavery.

Reparations theory is woefully unprepared to meet the challenge of partisan revisionism. It has a rich language for debating and specifying the remedies for historical injustice, but it lacks even a basic language for specifying what ought to count as a historical injustice. This Article has argued that the criminal law’s cultural defense, focusing, as it does, on the extent to which a perpetrator consciously chose to inflict harm, offers an analogy from which a language of historical injustice might develop. It is not a perfect analogy. By itself, it cannot plug the growing hole in the foundation of reparations theory. That important repair job will require more than simply a single provocative analogy from the criminal law—it will require a conversation

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.* (emphasis added).

<sup>246</sup> At other points in the column, Jacoby spoke of slavery as “wrongdoing,” which is inconsistent with his insistence that the banks had broken no laws. *See id.*

<sup>247</sup> *Id.* (emphasis added).

<sup>248</sup> The National Legal and Policy Center, probably the leading lobbyist against slavery reparations, makes this argument as well. *See* PETER FLAHERTY & JOHN CARLISLE, THE CASE AGAINST SLAVE REPARATIONS 5 (2004), available at [http://www.nlpc.org/pdfs/Final\\_NLPC\\_Reparations.pdf](http://www.nlpc.org/pdfs/Final_NLPC_Reparations.pdf) (“As tragic as slavery was, it was legal in the South between 1789 and 1865.”).

among historians, philosophers, and legal scholars. But time is of the essence. Partisan revisionists are hard at work weakening the foundations of redress and of American historical understanding, and they are on the television, radio, and the best-seller lists. The conversation must begin promptly.